Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 91-1502

In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL., APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JOINT APPENDIX

SCOTT HARSHBARGER
Attorney General
DWIGHT GOLANN
STEVE BERENSON
Assistant Attorneys General
JOHN P. DRISCOLL
EDWARD P. LEIBENSPERGER
NEIL P. MOTENKO
Special Assistant Attorneys General
One Ashburton Place
Room 2019
Boston, Massachusetts 02108
(617) 727-2200

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
JOHN G. ROBERTS, JR.
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

Notice of Appeal Filed: March 16, 1992
Appeal Docketed: March 18, 1992
Probable Jurisdiction Noted: March 20, 1992

EDITOR'S NOTE

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TABLE OF CONTENTS*

	Page
District Court Docket Entries	1
Complaint	20
Answer of Executive Branch Defendants	39
Excerpts from Administrative Record (A.R.)	46
Letter to Alfred Meisner, Esq., Department of Commerce, from William H. Rehnquist, AAG, Office of Legal Counsel, October 15, 1969	46
Statement of Robert L. Hagan, Deputy Director, Bureau of the Census, before the House Subcommittee on Census and Population, September 15, 1976	48
"Enumeration of Americans Living Abroad," by Meyer Zitter, Consultant	63
"Place of Abode," by Theodore G. Clemence	83
"Enumeration and Residence Rules for the 1990 Census: Who to Count and Where to Count Them," by Dr. John G. Keane, Director, Bureau of the Census	101
Letter to Honorable William D. Ford, Chairman, Committee on Post Office and Civil Service, House of Representatives, from Robert H. Brumley, General Counsel, Department of Commerce, dated June 8, 1988	110

* The opinions and judgment of the three-judge district court and the notice of appeal are printed in the appendix to the jurisdictional statement and have not been reproduced here.

CONTENTS—Continued

~~A.R.~~ *Page*

Letter to Honorable William D. Ford, Chairman, Committee on Post Office and Civil Service, House of Representatives, from Robert H. Brumley, General Counsel, Department of Commerce, dated June 23, 1988 112

Letter to Honorable William D. Ford, Chairman, Committee on Post Office and Civil Service, House of Representatives, from Robert H. Brumley, General Counsel, Department of Commerce, dated June 23, 1988 118

Decision Memorandum from Michael R. Darby, Under Secretary of Commerce for Economic Affairs, to Secretary of Commerce regarding "1990 Census: Counting Military and Dependents Overseas for Apportionment Purposes" 120

Statement of David J. Berteau, Deputy Assistant Secretary of Defense for Resource Management and Support, before the Subcommittee on Census and Population of the House Post Office and Civil Service Committee, August 1, 1989 123

Letter to Dr. Barbara Bryant, Director, Bureau of the Census, from Representatives William Clay, et al. of the House Committee on Post Office and Civil Service, April 5, 1990 128

CONTENTS—Continued

~~A.R.~~ *Page*

Memorandum to Michael R. Darby, Under Secretary of Commerce, and Barbara E. Bryant, Director, Bureau of the Census, from A. Mark Neuman, Chief, Office of Congressional Affairs, Bureau of the Census, regarding background information on overseas military, May 17, 1990 130

Letter to Representative Thomas C. Sawyer, Chairman, House Subcommittee on Population and Census, from Barbara E. Bryant, Director, Bureau of the Census, regarding overseas military personnel and "home of record," May 18, 1990 136

Letter to Honorable Richard Cheney, Secretary of Defense, from Robert A. Mosbacher, Secretary of Commerce, regarding enuemeration of Department of Defense personnel and dependents overseas, March 29, 1990 139

Congressional Research Service Report for Congress, "The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts" (June 20, 1990), by David C. Huckabee 142

Decision Memorandum from Michael R. Darby, Under Secretary of Commerce for Economic Affairs, for the Secretary of Commerce, regarding counting the overseas military and civilian employees in the decennial census 157

CONTENTS – Continued

~~A.R.~~ *Page*

Information Memorandum from Michael R. Darby, Under Secretary for Economic Affairs, for the Secretary of Commerce, regarding including overseas military personnel in 1990 Census count 160

Memorandum for Michael R. Darby, Under Secretary of Commerce for Economic Affairs, from Charles D. Jones, Associate Director of the Census for Decennial Census, regarding overseas military, July 13, 1990 164

Letter to Representative Thomas C. Sawyer from Michael R. Darby, Under Secretary of Commerce for Economic Affairs, regarding inclusion of overseas military personnel and dependents in the 1990 census, July 23, 1990 165

Letter to Senator John W. Warner, U.S. Senate, from Michael R. Darby, Under Secretary of Commerce for Economic Affairs, regarding method for counting overseas personnel, September 11, 1990 ... 167

Letter to Dr. Hermann Habermann, Chief, Statistical Policy Office, Office of Management and Budget, from Barbara E. Bryant, Director, Bureau of the Census, regarding the inclusion of overseas Defense Department employees and their dependents in the 1990 census, August 15, 1990 169

Stipulation of Facts, November 1, 1991 172

Order Noting Probable Jurisdiction, March 20, 1992 244

DISTRICT COURT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234-WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

Bownes, *Senior Circuit Judge*
Boyle, *District Judge*
Woodlock, *District Judge*

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
5/1/9 .	1	Complant filed (bdb) [Entry date 05/02/91]

DATE	NR	PROCEEDINGS
5/1/91	–	Filing Fee Paid. Receipt #: 09257 Amount: 120.00. (bdb) [Entry date 05/02/91]
5/1/91	–	Summons(es) issued for Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson (bdb) [Entry date 05/02/91]
5/20/91	3	Notice of attorney appearance for Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush by Judith S. Yogman, Sandra M. Schraibman (cmg) [Entry date 06/03/91]
5/24/91	2	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler For Rule 16b Conference, FILED. (c/s) (cmg) [Entry date 06/03/91]
5/31/91	4	Response by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donald K. Anderson to [2-1] motion For Rule 16b Conference, FILED. (c/s) (cmg) [Entry date 06/03/91]
6/7/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [2-1] motion For Rule 16b Conference . . . ALLOWED to the extent the clerk shall set down such a conference in the beginning

DATE	NR	PROCEEDINGS
		of August by which time the Court anticipates the parties will have evaluated the Secretary of Commerce's decision as mandated in the City of New York litigation and will have met and worked toward a proposed scheduling order and a stipulation of Facts, FILED. (cc/cl) (cmg)
6/7/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [2-1] motion For Rule 16b Conference. . . Counsel appear for a Rule 16b conf on 8/8/91 at 2:30 p.m., FILED. (cc/cl) set status conference for 2:30 8/8/91 before Judge Douglas P. Woodlock (cmg) [Entry date 06/11/91]
6/10/91	5	Motion by the State of Washington to Appear Amicus, FILED. (c/s) (cmg)
6/10/91	6	Memorandum in support of [5-1] motion to Appear Amicus FILED. (c/s) (cmg)
6/10/91	7	Motion for James M. Johnson, Sr. to appear pro hac vice, FILED. (c/s) (cmg)
6/10/91	8	Certificate of Good Standing by Attorney James M. Johnson, FILED. (c/s) (cmg)
6/14/91	9	Affidavit of Service by Mail of Motion for Leave to Appear, et al on counsel for all parties. FILED. (cmg)

DATE	NR	PROCEEDINGS
6/24/91	11	Ltr. to Clerk from Atty. Murphy confirming resched. of Rule 16b conf to 8/16/91 at 2:30 p.m., FILED. (c/s) (cmg) [Entry date 07/16/91]
6/26/91	13	STIPULATION by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson extending time for defts to respond to Document requests until 8/19/91, FILED. (cmg) [Entry date 08/01/9]
6/28/91	10	Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson to extend time to respond to Complaint for 30 days, FILED. (assented to) cmg) [Entry date 07/01/9]
7/22/91	12	Notice of Hearing: reset miscellaneous hearing Re: Rule 16B Conference on 8/27/91 at 2:15 before Judge Douglas P. Woodlock. cc/cl. (cpp) [Entry date 07/24/91]
8/5/91	14	Answer to Complaint by Robert Mosbacher, Michael Darby Barbara Bryant, George Herbert Walker Bush, FILED. (c/s) (cmg) [Entry date 08/09/91]
8/14/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [5-1] motion to Appear Amicus for the State of Washington, FILED. (cc/cl) [Entry date 08/20/91]

DATE	NR	PROCEEDINGS
8/14/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [7-1] motion for James M. Johnson, Sr. to appear pro hac vice (cmg) [Entry date 09/03/91]
8/22/91	15	STIPULATION by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler, Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, Washington, State of extending time for executive Branch defts to serve discovery until 8/26/91, FILED. (cmg) [Entry date 09/30/91]
8/27/91	–	Status conference held (cmg) [Entry date 09/03/91]
8/27/91	16	Judge Douglas P. Woodlock. Clerk's Notes:, set discovery due for 10/4/91, set motion filing (of cross motions for S/J) deadline for 10/18/91, Response to motion due by 11/1/91; replies by 11/8/91. Briefs from Montana case to be submitted as soon as possible. Formal positions of the parties re: Three judge Court and oversee Military claim by 9/13/91. Parties to also inform Court of critical dates in other litigation by 9/13/91, FILED. (cmg) [Entry date 09/03/91]
8/29/91	17	Notice of filing by George Herbert Walker Bush, Donnald K. Anderson the administrative record prepared in

DATE	NR	PROCEEDINGS
		connection with the decision to include overseas federal military and civilian emploees and their dependents in the 1990 census apportionment counts, FILED. (cmg) [Entry date 09/03/91]
8/30/91	18	STIPULATION by George Herbert Walker Bush, Donnald K. Anderson, extending time to resply to ps' first req. for documents and request to Admit facts to 9/11/91, FILED. (assented to) (cmg) [Entry date 09/03/91]
8/30/91	19	Notice of filing by George Herbert Bush, Donnald K. Anderson of briefs filed in State of Montana, et al v. United States Dept. of Commerce, et al, C.A. No. CV 91-22-H-CCL, Filed. (c/s) (cmg) [Entry date 09/03/91]
9/13/91	20	Motion by George Herbert Walker Bush, Donnald K. Anderson for leave to file brief in excess to Judge Douglas P. Woodlock, FILED. (unopposed) (cmg) [Entry date 09/16/91]
9/13/91	21	Memorandum by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in support of its

DATE	NR	PROCEEDINGS
		Position on Three-Judge Court, FILED. (c/s) (cmg) [Entry date 09/16/91]
9/13/91	22	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler For Adjudication by Three-Judge Court to Judge Douglas P. Woodlock, FILED. (c/s) (cmg) [Entry date 09/16/91]
9/13/91	23	Memorandum by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in support of [22-1] motion For Adjudication by Three-Judge Court, FILED. (c/s) (cmg) [Entry date 09/16/91]
9/16/91	24	STIPULATION by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler, Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, Washington, State of extending time for Executive Branch Defts to reply to discovery to 9/25/91, FILED. (cmg) [Entry date 09/20/91]
9/24/91	–	Terminated document(s) mooting [10-1] motion to extend time to respond to Complaint for 30 days, Filed. (assented to) Requested by biq. (lt)

DATE	NR	PROCEEDINGS
9/24/91	25	STIPULATION by Commonwealth of Mass, George Herbert Walker Bush, Donnald K. Anderson, to extend time to respond to Disc. to 9/23/91, FILED. (cmg) [Entry date 10/07/91]
10/4/91	30	STIPULATION by Commonwealth of Mass, Barbara Bryant, George Herbert Walker Bush extending time for response to disc. to 10/4/91, FILED. (cmg) [Entry date 11/01/91]
10/8/91	31	STIPULATION by Barbara Bryant, George Herbert Walker Bush extending time to 10/11/92 for disc. (cmg) [Entry date 11/01/91]
10/9/91	32	Judge Douglas P. Woodlock. Clerk's Notes: phone conference held re case status. Memorandum and Order to be issued regarding three-judge court. Briefs to be filed by 11/1/91, oppos. by 11/15/91; replies (if necessary) by 11/22/91, FILED. (cmg) [Entry date 11/01/91]
10/15/91	26	Judge Douglas P. Woodlock. Scheduling Memorandum and Order In Connection With the Convening of a Three-Judge Court ISSUED: P's submission to be filed by 11/1/91; deft's submissions by 11/15/91 set scheduling order deadlines: Status conference on 9:30 12/6/91, FILED. (cc/cl) (cmg) [Entry date 10/17/91]

DATE	NR	PROCEEDINGS
10/17/91	27	STIPULATION by Commonwealth of Mass, George Herbert Walker Bush, Donnald K. Anderson, extending time to respond to disc. to 10/18/91, FILED. (c/s) (cmg) [Entry date 10/22/91]
10/23/91	28	STIPULATION by Commonwealth of Mass, Barbara Bryant, George Herbert Walker Bush, extending time to respond to disc. to 10/23/91, FILED. (cmg) [Entry date 10/28/91]
10/23/91	33	Judge Douglas P. Woodlock. Clerk's Notes: Phone conf held. Sscheduling order to be modified. Verbal Motion to stay apportionment claims DENIED. Montana decision to be filed with the Court today. Parties instrucsted [sic] to file copies of all filings made with the Supreme Court in this case. Copies should also be delivered to Judge Bownes and Boyle, FILED. (cmg) [Entry date 11/01/91]
10/24/91	34	Judge Douglas P. Woodlock. Scheduling Order setting Deadline for filing of all dispositive motions 11/5/91, responsive submissions 11/15/91, Reply submissions 11/22/91, FILED. (cc/cl) (cmg) [Entry date 11/04/91]
10/24/91	36	Ltr. to Judge Woodlock from counsel for defts requesting Court modify its Oct. 15, 1991 Memorandum, FILED. (c/s) (cmg) [Entry date 11/04/91]

DATE	NR	PROCEEDINGS
10/28/91	29	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson the three-judge court's decision (along with the dissent) in State of Montana v. U.S. Dept of Commerce CA no. 91-22-H-CCL, FILED. (c/s) (cmg)
10/31/91	37	STIPULATION by Commonwealth of Mass, Barbara Bryant, George Herbert Walker Bush extending time to respond to P's disc. requests to 10/30/91, FILED. (cmg) [Entry date 11/04/91]
11/1/91	35	Copy of Judgment and Permanent Inunction entered in District of Montana in State of Montana v. U.S. Department of Commerce, FILED. (cmg) [Entry date 11/04/91]
11/5/91	38	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush for judgment on the pleadings, FILED. (c/s) (cmg)
11/5/91	39	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush for summary judgment FILED. (c/s) (cmg)
11/5/91	40	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush TO Dissolve Three-Judge Court, FILED. (c/s) (cmg)

DATE	NR	PROCEEDINGS
11/5/91	41	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush for leave to file brief in excess, FILED. (unopposed) (cmg)
11/5/91	42	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush in support of [40-1] motion TO Dissolve Three-Judge Court, [39-1] motion for summary judgment, [38-1] motion for judgment on the pleadings, FILED. (c/s) (cmg)
11/5/91	45	Proposed Findings of fact and conclusions of law by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler, Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, Washington, State of, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/5/91	46	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for summary judgment, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/5/91	47	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Telefaxed Affidavit (cmg) [Entry date 11/07/91]
11/5/91	48	Affidavit of Jeffrey L. Levy, FILED. (c/s) (cmg) [Entry date 11/07/91]

DATE	NR	PROCEEDINGS
11/5/91	49	STIPULATION by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler to file brief in excess of twenty-page limit, FILED. (cmg) [Entry date 11/07/91]
11/5/91	50	Memorandum by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in support of [46-1] motion for summary judgment (cmg) [Entry date 11/07/91]
11/6/91	43	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Original Affidavit of Previously Filed Telefaxed Affidavit One Day Late, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/6/91	44	(Original) Affidavit of H. Peyton Young, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/8/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [43-1] motion for leave to file Original Affidavit of Previously Filed Telefaxed Affidavit One Day Late, FILED. (cc/cl) (cmg) [Entry date 11/14/91]
11/15/91	51	STIPULATION by Commonwealth of Mass, for leave to file in excess of twenty page limit, FILED. (cmg) [Entry date 11/19/91]
11/15/91	52	Memorandum by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in opposition to [39-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/19/91]

DATE	NR	PROCEEDINGS
11/15/91	53	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Telefaxed Affidavit, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/15/91	54	Supplemental Affidavit of H. Peyton Young Re: [52-1] opposition memorandum, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/15/91	55	STIPULATION by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, for leave to file Brief in excess, FILED. (cmg) [Entry date 11/19/91]
11/15/91	56	Response by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in opposition to [46-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/15/91	57	Memorandum by Washington, State of in support of [39-1] motion for summary judgment, [38-1] motion for judgment on the pleadings, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/20/91	64	Motion by Commonwealth of Mass for leave to file Original of Previously Faxed Affidavit, FILED. (c/s) (cmg) [Entry date 12/03/91]
11/22/91	58	Reply by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson to resonse to [39-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/25/91]

DATE	NR	PROCEEDINGS
11/22/91	59	Motion by Commonwealth of Mass to strike [57-1] support memorandum, FILED. (c/s) (cmg) [Entry date 11/26/91]
11/22/91	60	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Telefaxed Affidavit, FILED. (c/s) (cmg) [Entry date 11/26/91]
11/22/91	61	Telefaxed Second Supplemental Affidavit of H. Peyton Young Re: [46-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/26/91]
11/22/91	62	Reply by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler to response to [46-1] motion for summary judgment FILED. (c/s) (cmg) [Entry date 11/26/91]
11/25/91	65	Motion by Commonwealth of Mass for leave to file Original of Previously Telefaxed Affidavit Second Supplemental Affidavit of H. Peyton Young, FILED. (c/s) (cmg) [Entry date 12/03/91]
11/29/91	63	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson Petition for a Writ of Certiorari Before Judgment to the U.S. Court of Appeals for the Ninth Circuit in State of Montana, et al v.

DATE	NR	PROCEEDINGS
		U.S. Dept. of Commerce CA 91-22-H-CCL filed w/Supreme Court on 11/26/91, FILESD. (cmg) [Entry date 12/02/91]
12/23/91	66	Notice of Change of Address for Aatty. Mark H. Murphy, counsel for Defts Mosbacher, Darby, Bureau of Census, B. Bryant, and George Herbert Walker Bush, FILED. (c/s) (cmg) [Entry date 01/09/92]
1/10/92	67	Transcript of Hearing held on 12/6/91, FILED. (cmg)
1/23/92	68	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson Brief for Appellants filed with the Supreme Court on 1/15/92 in State of Montana v. U.S. Dept. of Commerce, et al. FILED. (c/s) (cmg)
2/6/92	69	Notice of attorney appearance for Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson by Susan Korytkowski, to be substituted for Mark H. Murphy, Esq., FILED. (biq)
2/6/92	70	Notice of filing by Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson Brief of the State of Washington as Amicus in Support of Appellants dated 1/15/92 in Montana v. U.S. Dept. of Commerce, FILED. (c/s) (biq) [Edit date 02/06/92]

DATE	NR	PROCEEDINGS
2/19/92	71	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson of Copy of Brief of Appellees in U.S. Dept. of Commerce v. Montana, FILED. (c/s) (cmg) [Entry date 02/20/92]
2/20/92	72	Three-Judge panel Opinion ISSUED: Senior Circuit Judge Bownes, District Judge Boyle, District Judge Woodlock: Defts' Motion for S/J as to the apportionment claim and Ps' Motion for S/J as to the overseas census claim grounded upon a violation of the Administrative Procedure Act are ALLOWED. A set of final decrees and orders reflecting this judgment shall issue, FILED. (cc/cl) (cmg) [Entry date 02/24/92]
2/20/92	73	Three-Judge panel Final Decrees and Orders ISSUED, FILED. (cc/cl) (cmg) [Entry date 02/24/92]
2/20/92	–	Case closed (heb) [Entry date 02/28/92]
3/6/92	74	Unopposed Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson for leave to file Brief in excess of 20 pages, FILED, (c/s) (heb)
3/6/92	75	Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson for reconsideration of [73-1] order, FILED. (c/s) (heb)

DATE	NR	PROCEEDINGS
3/6/92	76	Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts pending ruling on dfts' motion for reconsideration or pending appeal, FILED. (c/s) (heb)
3/6/92	77	Memorandum by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in support of [76-1] motion to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts, [75-1] motion for reconsideration of [73-1] order, FILED. (c/s) (heb)
3/9/92	78	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler to strike post-judgment "declarations"; FILED. (c/s) (heb) [Entry date 03/10/92]
3/9/92	79	Affidavit of Craig Stafford Re: [78-1] motion to strike post-judgment "declarations," FILED. (c/s) (heb) [Entry date 03/10/92]
3/10/92	80	Response by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in opposition to [75-1] motion for reconsideration of [73-1] order, FILED. (c/s) (heb)

DATE	NR	PROCEEDINGS
3/10/92	81	Response by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in opposition to [76-1] motion to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts, FILED.(c/s) (heb)
3/10/92	82	Affidavit of William P. Lee Re: [80-1] opposition response, FILED. (c/s) (heb)
3/13/92	83	Memorandum by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in opposition to [78-1] motion to strike post-judgment "declarations" [heb)
3/13/92	84	Certification of the Commonwealth of MA, FILED. (c/s) (heb)
3/13/92	85	Judge Douglas P. Woodlock. Order granting [78-1] motion to strike post-judgment "declarations" denying [76-1] motion to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts, denying [75-1] motion for reconsideration of [73-1] order, ISSUED. (cc/cl) (heb) [Entry date 03/16/92]
3/16/92	86	Notice of appeal to Supreme Court by Bureau of the Census, Barbara Bryant, George Herbert Walker

DATE	NR	PROCEEDINGS
		Bush, Barbara Hackman Franklin, and Mark W. Plant from the Final Decrees and Orders dated 2/20/92 and the Orders of 3/13/92. Filed. Notice sent to counsel of record. (kmn) [Entry date 03/17/92]
3/16/92	87	Notice of appeal by Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Barbara Hackman Franklin, and Mark W. Plant, Appeal record due on 4/15/92, filed. Notice sent to counsel. (kmn) [Entry date 03/17/92]
3/16/92	88	Certificate of service by Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Barbara Hackman Franklin, and Mark W. Plant as to the notices of appeal. (kmn) [Entry date 03/17/92]
3/17/92	–	Certified copy of docket, Notice of Appeal, Opinion and Final Decrees and Orders forwarded to United States Supreme Court on this date. (kmn)

COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.:

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

PRELIMINARY STATEMENT

1. This is an action by the Commonwealth of Massachusetts and individual citizens and voters in the Commonwealth seeking relief from the unconstitutional elimination of a Massachusetts seat in the United States House of Representatives as a result of the 1990 Decennial Census.

2. The Commonwealth has received official notice that the number of congressional seats allocated to the citizens of Massachusetts will be reduced from eleven to

ten. This will also reduce Massachusetts' Electoral College votes in future presidential elections. If this is allowed to occur, plaintiffs will be deprived of their proper, fair and proportionate representation in Congress, in violation of their rights under the United States Constitution.

3. Specifically, plaintiffs will demonstrate that defendants (a) counted federal employees who were residing abroad on the date of the 1990 Census as if they were residents of individual states, in violation of the constitutional mandate to apportion representatives in Congress according to the number of persons "in each State"; (b) apportioned such overseas federal employees using a standard that was inconsistent with the Census Bureau's historical practice and with the rule applied by the Bureau to count persons within the fifty states; and (c) pursuant to federal statute applied a mathematical formula to apportion seats in the House of Representatives, designated as the equal proportions method (otherwise known as the "Hill-Huntington method"), which is systematically biased in favor of less populated states and, thus, violates the constitutional principle of "one person, one vote". As a direct result of these violations, one less seat in Congress will be allocated to Massachusetts.

JURISDICTION

4. This action arises under Article I, Section 2 of the U.S. Constitution, the Fifth Amendment and Section 2 of the Fourteenth Amendment, the laws of the United States relating to the taking of the census and to the apportionment of representatives, 2 U.S.C. § 2a, 13 U.S.C. § 141, and the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.*

5. Jurisdiction over this action is based upon 28 U.S.C. § 1331 (federal question jurisdiction) and 28

U.S.C. § 1361 (mandamus). Declaratory relief is authorized by 28 U.S.C. §§ 2201, 2202. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff Commonwealth of Massachusetts is a sovereign state of the United States. The Commonwealth is entitled to a number of Representatives in Congress pursuant to Article I, Section 2, Clause 3 of the Constitution, as amended by section 2 of the Fourteenth Amendment, apportioned on the basis of "the whole number of persons in" the state.

7. Plaintiff Edward F. Berlin is a citizen of the United States and a registered voter in the Commonwealth of Massachusetts, residing in Greenfield, Massachusetts, which is presently a part of the 1st Congressional District.

8. Plaintiff Karen J. Kepler is a citizen of the United States and a registered voter in the Commonwealth of Massachusetts, residing in Brookline, Massachusetts, which is presently a part of the 4th Congressional District.

9. Defendant Robert Mosbacher is the Secretary of the United States Department of Commerce and in that capacity is responsible for the administration of the Department, including the defendant Bureau of the Census.

10. Defendant Michael Darby is the Undersecretary for Economic Affairs of the United States Department of Commerce, and is responsible for overseeing the Director of the Bureau of the Census.

11. Defendant Barbara Bryant is the Director of the defendant Bureau of the Census of the United States Department of Commerce.

12. Defendant George Herbert Walker Bush is the President of the United States.

13. Defendant Donnald K. Anderson is the Clerk of the United States House of Representatives.

STATUTORY FRAMEWORK

14. Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, requires that the House of Representatives be chosen "by the People of the several States" and that each state receive a number of Representatives in proportion to "the whole number of persons in each State."

15. Pursuant to 13 U.S.C. § 141, defendant Mosbacher was responsible for conducting the Decennial Census in 1990 and for reporting the "total population by states" to the President by December 31, 1990.

16. Pursuant to 2 U.S.C. § 2a, the President was responsible for transmitting to the Congress a statement showing "the whole number of persons in each state . . . as ascertained under" the census, and the number of members of the House of Representatives to which each state is entitled under a mathematical formula. The Clerk of the House of Representatives thereafter was responsible for transmitting to the Governor of each state a certificate showing the number of Representatives that such state may elect to Congress.

17. The President transmitted the statement to the Congress in January 1991. On January 16, 1991 the Clerk of the House of Representatives transmitted to Governor William Weld of Massachusetts a certificate stating that, as a result of the census tabulations preprared by defendants and the current mathematical apportionment method, Massachusetts will lose one of its eleven congressional seats.

18. Pursuant to 13 U.S.C. § 141(c), defendants Mosbacher, Darby and Bryant are required to prepare and

certify tabulations of the populations of each state, broken down by cities and other governmental units. The Commonwealth must use the census tabulations prepared by the defendants for the purpose of apportioning districts within the Commonwealth for Representatives in Congress.

STATEMENT OF FACTS

Counting of Federal Overseas Employees

The "Usual Residence" Rule

19. The Constitution requires that Representatives in Congress be apportioned among the States according to "the whole number of persons in each State," as determined by the most recent decennial census. Article I, Section 2, U.S. Constitution, as amended by Section 2 of the Fourteenth Amendment.

20. In accordance with the Constitution, the federal census has, since the founding of the United States, counted persons according to their "usual place of abode" or "usual residence." Beginning with the 1790 Census, federal authorities have consistently counted all persons, except travelers occasionally absent from their abode, at the place where they were living and sleeping on the date of the census.

Conduct of the 1990 Census

21. In 1990, rules of the Census Bureau mandated the use of the "usual residence" in conducting the census.

22. In conducting the 1990 Census, the Census Bureau in fact applied the "usual residence" rule to count persons in all of the fifty states according to where they were usuallly living and sleeping as of April 1, 1990.

23. For example, consistent with its rules and historical practice, the Census Bureau counted college students at the institutions where they were enrolled on April 1, 1990, rather than where they lived during vacations or where their family homes were located. The Bureau also counted prison inmates, residents of chronic care hospitals, and other institutionalized persons in the institutions where they were living and sleeping on April 1, rather than where they had lived before commitment or where they intended to reside after release.

24. The Census Bureau also applied the "usual residence" rule to count soldiers and other federal employees based in the United States according to where they were usually living and sleeping as of the 1990 Census date.

25. In conducting the 1990 Census, the Census Bureau did not, however, count federal employees living in foreign countries according to the "usual residence" rule. Instead, the Census Bureau apportioned federal employees and their dependents who were living abroad on the census date to states according to the "home of record" which the employee had listed upon entering government service.

26. An overseas federal employee's "home of record" may or may not be the place where that person intends to live when he or she returns to the United States. In particular, federal military employees are required to designate a "home of record" when they enlist, and are not permitted to change their designated home of record during their term of service, regardless of their actual or intended residence or domicile.

27. The "home of record" method used by the Census Bureau to apportion overseas federal employees was thus patently inconsistent with the "usual residence" rule that

the Bureau used to apportion all other persons in the 1990 Census in that such method did not identify where those employees were usually residing on the 1990 Census date.

28. As a direct result of the Census Bureau's decision to apportion federal employees and their dependents who were living in foreign countries on the date of the 1990 Census to states in which they were not then residing, the Commonwealth of Massachusetts will lose one seat in the House of Representatives, and will suffer a reduction in its Electoral College votes in future presidential elections.

The Constitution and Census Practice

29. The Census Bureau's 1990 decision not to count federal employees living overseas according to its "usual residence" rule violated the express mandate of the Constitution and nearly two hundred years of consistent federal practice in conducting the Census.

30. The First Congress, which included among its members many of the Framers of the Constitution, adopted the First Decennial Census Act of 1790 to govern the taking of the census. That Act specified that persons should be counted and apportioned at their "usual place of abode" on the date of the census. In the 1790 Census, persons residing abroad or in the Territories of the United States were not apportioned to any state for purposes of congressional representation.

31. During the censuses immediately following the ratification of the Constitution, and immediately following the adoption of the Fourteenth Amendment's mandate to apportion congressional representatives according to the number of persons "in each State," federal census enumerators counted for apportionment purposes only those persons who were physically residing in a state on the census date. Only once, in 1970, did a census count overseas employees for apportionment purposes.

32. In 1988-89, Congress considered legislation that would have required the Census Bureau to count overseas federal employees in the 1990 Census according to their homes of record. Defendant Department of Commerce formally opposed the enactment of this legislation.

33. In September 1988, through its General Counsel, the Department of Commerce informed Congress that "The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, Federal civilian employees, or their dependents, when such individuals live outside the United States." The Department of Commerce also advised Congress that "The Administration believes that the concept of 'usual residence,' where a person lives and sleeps most of the time, is the appropriate basis for deciding who should be counted in the census." A true and accurate copy of the Department's statement to Congress appears as Exhibit A to this Complaint.

34. Congress did not enact any legislation concerning the method of counting overseas federal employees or their dependents for congressional apportionment purposes in the 1990 Census.

The Apportionment Formula

35. Article 1, Section 2, Clause 3 of the Constitution as modified by Section 2 of the Fourteenth Amendment requires that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers."

36. Apportionment among the states means that congressional district boundaries cannot cross state lines. In addition, the Constitution requires that every state must have at least one Representative and a congressional

district cannot include less than 30,000 people. Taking into account these constitutional requirements, the apportionment of the population into congressional districts must afford the citizens of the United States, including plaintiffs, equal and fair representation as nearly as practicable.

37. By dividing the national population by the total number of seats in the House of Representatives (435), a national-average-size congressional district is obtained. In 1990 the national-average-size congressional district was 572,466 persons. When the national average size district is divided into the population of a state, the mathematical result is that there is (except for the 3 smallest states) a whole number of congressional seats plus a fraction of a seat. Dividing the national-average-size district into the total population of a state will produce a number (for example, 4.37 or 10.53 or 6.85) of congressional seats. This number is generally referred to as the "House seat quota."

38. A state cannot have a "fraction of a Representative"; thus, the fractions of seats must be allocated among the states so that each state is apportioned a whole number of Representatives.

39. In the history of the United States several different mathematical methods have been used to allocate seats (including fractions of seats) in the House of Representatives among the states. Among such methods are the major fractions formula (known as the "Webster formula") and the method of equal proportions (known as the "Hill-Huntington formula").

40. In 1941 Congress passed an apportionment act (55 Stat. 761, codified at 2 U.S.C. § 2a) that, among other things, mandated the Hill-Huntington mathematical formula for allocating fractions of seats.

41. Subsequent experience, and modern mathematical analysis, demonstrate that the Hill-Huntington method is

systematically biased in favor of less populated states to the detriment of the other states. The bias inherent in the Hill-Huntington method violates the ideal of one person, one vote guaranteed by the Constitution.

42. The mathematical formula for apportionment known as the Webster method has no statistical bias toward either less or more populated states.

43. Pursuant to the 1990 Decennial Census, the apportionment of Representatives among the states resulted in a House seat quota for Massachusetts of 10.53 congressional seats.

44. Pursuant to the Hill-Huntington formula, Massachusetts is allocated ten congressional seats.

45. Pursuant to the Webster formula, Massachusetts is allocated eleven congressional seats.

46. Massachusetts will suffer a unique injury as a result of the bias inherent in the Hill-Huntington apportionment method. The use of that biased mathematical formula will cause Massachusetts to lose a congressional seat to a less populated state, and will reduce Massachusetts' Electoral College votes in future presidential elections. Such a result dilutes the votes of Massachusetts citizens to the benefit of others, thus depriving Massachusetts citizens of the constitutional guarantee of one person, one vote.

FIRST CLAIM FOR RELIEF – UNCONSTITUTIONAL APPORTIONMENT FORMULA

47. Plaintiffs incorporate by reference the allegation of paragraphs 1 to 46, above.

48. That portion of 2 U.S.C. § 2a that requires the apportionment of seats in the House of Representatives among the states by the method known as equal proportions (or Hill-Huntington) violates the constitutional prin-

ciple of one person, one vote as mandated by Article I, Section 2 and the Fifth Amendment of the United States Constitution.

49. As a direct result of the application of 2 U.S.C. § 2a by defendants to the 1990 Decennial Census, the number of seats in the House of Representatives allocated to Massachusetts will be unconstitutionally reduced from eleven to ten, and the Commonwealth will lose Electoral College votes in future presidential elections.

50. As a direct result of the application of 2 U.S.C. § 2a by defendants to the 1990 Decennial Census, the individual plaintiffs, citizens of Massachusetts, will be deprived of fair and equal representation guaranteed by the constitutional principle of one person, one vote.

SECOND CLAIM FOR RELIEF – CONSTITUTIONAL VIOLATION

51. Plaintiffs incorporate by reference the allegations of paragraphs 1 to 50, above.

52. Defendants' inclusion of overseas federal employees and their dependents in the 1990 Census for congressional apportionment purposes violates the requirement of Article I of the Constitution, as amended by the Fourteenth Amendment, that Representatives in Congress be apportioned among the states in proportion to "the whole number of persons in each State."

53. As a direct result of defendants' inclusion and apportionment of overseas federal employees and their dependents to particular states in the 1990 Census, Massachusetts will lose one of its seats in the House of Representatives, and the Commonwealth will lose Electoral College votes in future presidential elections.

54. As a direct result of defendants' inclusion and apportionment of overseas federal employees and their dependents to particular states in the 1990 Census, the individual plaintiffs, who are citizens of Massachusetts, will be deprived of fair and equal representation guaranteed by the constitutional principle of one person, one vote.

THIRD CLAIM FOR RELIEF – ADMINISTRATIVE PROCEDURE ACT

55. Plaintiffs incorporate by reference the allegations of paragraphs 1 to 54, above.

56. The Census Bureau's application of its "usual residence" rule to apportion persons in all the fifty States in the 1990 Census, but disregard of that rule and apportionment of federal employees and dependents living abroad to particular states, was arbitrary, capricious and in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

57. As a direct result of defendants' counting overseas federal employees and their dependents for purposes of congressional apportionment in the 1990 Census, Massachusetts will lose one of its seats in the House of Representatives, and the Commonwealth will lose Electoral College votes in future presidential elections.

58. As a direct result of the defendants' inclusion of overseas federal employees and their dependents in the 1990 apportionment population, the individual plaintiffs, who are citizens of Massachusetts, will be deprived of fair and equal representation guaranteed by the constitutional principle of one person, one vote.

PRAYERS FOR RELIEF

59. WHEREFORE, plaintiffs seek judgment:

(a) Declaring unconstitutional so much of 2 U.S.C. § 2a as requires the apportionment of seats in the House of Representatives among the states by the method known as equal proportions;

(b) Ordering that the apportionment following the 1990 Decennial Census be accomplished pursuant to the mathematical formula that will guarantee, as nearly as practicable, the constitutional principle of one person, one vote;

(c) Declaring that the practice of counting overseas federal employees for the purpose of apportioning seats in the House of Representatives among the States was arbitrary, capricious, and contrary to law and the Constitution;

(d) Ordering that the apportionment of seats in the House of Representatives among the States following the 1990 Decennial Census be carried out based upon the numbers of persons who had a usual residence within a State as of the Census date; and

(e) Granting such other relief as the Court deems just and proper.

SCOTT HARSHBARGER
Attorney General of the
Commonwealth of Massachusetts

/s/ DWIGHT GOLANN
/s/ WILLIAM P. LEE
/s/ STEVEN BERENSON

Dwight Golann
BBO #196720
William P. Lee
BBO #549943
Steven Berenson
BBO #555765
Assistant Attorneys General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200

/s/ JOHN P. DRISCOLL, JR.
/s/ EDWARD P. LEIBENSPERGER
/s/ NEIL P. MOTENKO

John P. Driscoll, Jr.
BBO #135360
Edward P. Leibensperger
BBO #262620
Neil P. Motenko
BBO #358160
Special Assistant Attorneys
General
NUTTER, MCCLENNEN & FISH
One International Place
Boston, Massachusetts 02110
(617) 439-2000

DATED: May 1, 1991

EXHIBIT A

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of this Department on H.R. 4720, a bill to amend title 13, United States Code, to require the Secretary of Commerce to include all Federal civilian and military personnel stationed overseas, and their dependents living overseas, in the census counts for apportionment.

The bill would require that "any member of any of the uniformed services . . ." and "any civilian employee of the United States who is absent from the United States as a result of having been assigned to a post of duty outside the United States, and any dependent of any such member who has left the United States in order to reside at or near such post" be included in the apportionment counts. It specifies that the place of residence for these persons "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer."

The Department opposes the enactment of H.R. 4720. The Administration believes that the concept of "usual residence," where a person lives and sleeps most of the

time, is the appropriate basis for deciding who should be counted in the census. Because no administrative records exist that include the necessary residence information or information about dependents, H.R. 4720 would require a complete census of all overseas Federal employees.

The Office of Personnel Management reports that 11 cabinet departments and 17 other Federal agencies had citizen employees in foreign countries as of January 1988. These employees were stationed in about 160 countries. Adding such a large and costly operation to the census this late in the decade gives the Census Bureau little time to plan, coordinate, and budget for this effort.

The Census Bureau and the Department of Defense (DOD) have agreed to conduct a census of overseas DOD employees and their dependents. The data collected under this agreement are for statistical purposes, not apportionment. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Bureau of the Census. There is no comparable agreement with any of the 27 other agencies that have employees stationed overseas.

The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, Federal civilian employees, or their dependents, when such individuals live outside the United States.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

/s/ ROBERT B. BRUMLEY

Robert B. Brumley
General Counsel

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ANSWER OF EXECUTIVE BRANCH DEFENDANTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234 WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

EXECUTIVE BRANCH DEFENDANTS' ANSWER

Defendants Robert Mosbacher, Michael Darby, the Bureau of the Census, Barbara Bryant, and George Herbert Walker Bush, by and through their undersigned counsel, hereby answer plaintiffs' Complaint as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiffs' Complaint fails to establish standing to maintain this action.

THIRD DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

FOURTH DEFENSE

In response to the numbered paragraphs of the Complaint, Executive Branch defendants answer as follows:

1. Paragraph 1 contains plaintiffs' characterizations of their Complaint, as to which no response is required, but to the extent a response is required, denied.

2. Admit the first and second sentences. The third sentence contains conclusions of laws, as to which no response is required, but to the extent a response is required, denied.

3. Subsection (b) of Paragraph 3 is denied. The remainder of Paragraph 3 contains conclusions of law, as to which no response is required, but to the extent a response is required, denied.

4. Paragraph 4 contains plaintiffs' jurisdictional allegations, as to which no response is required, but to the extent a response is required, denied.

5. Paragraph 5 contains plaintiffs' jurisdictional allegations, as to which no response is required, but to the extent a response is required, denied.

6. Admit.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of Paragraph 7.

8. Defendants lack knowledge or information sufficient to form a belief as to the truth of Paragraph 8.

9. Admit.

10. Admit.

11. Admit.

12. Admit.

13. Admit.

14. Denied, except to admit that Article I, Section 2 of the Constitution contains the quoted material, and defendants refer the Court to Article I, Section 2 for a full and complete statement of its contents.

15. Admit.

16. Admit.

17. The first sentence is admitted. The second sentence is denied, except to admit that the certificate sent to Governor William Weld stated that Massachusetts would have ten seats in the United States House of Representatives as a result of the census tabulations.

18. The first sentence is denied, except to admit that, pursuant to 13 U.S.C. § 141(c), defendant Mosbacher and his delegatees are required to provide population data to each state after the state has submitted a plan identifying the geographic areas for which specific tabulations of population are desired. Defendants lack knowledge or information sufficent to form a belief as to the truth of the second sentence as it regards Massachusetts' law, and aver that federal law does not require that states use census tabulations for purposes of apportionment of congressional districts.

19. Admit.

20. Admit the first sentence. The second sentence is denied.

21. Admit, but aver that the Census Bureau applies a set of standardized procedures to each living situation to determine the appropriate enumeration location.

22. Admit.

23. The first sentence is denied, except to admit that the Census Bureau counted college students in the communities where they were attending school on April 1, 1990. Admit the second sentence.

24. Admit.

25. Denied.

26. Admit the first sentence. The second sentence is denied, except to admit that federal military employees are required to designate a "home of record" when they enlist.

27. Denied.

28. Denied, except to admit that, pursuant to the inclusion of the overseas military and federal employees and their dependents in the apportionment counts, the Commonwealth of Massachusetts lost a seat.

29. Paragraph 29 is a legal conclusion to which no response is required, but to the extent a response is required, denied.

30. Denied, except to admit that 1 Stat. 101 contains the quoted language, and defendants refer the Court to 1 Stat. 101 for a full and complete statement of its contents.

31. Admit, but aver that federal census enumerators counted for apportionment purposes only those persons who were usually physically residing in a state on the census date.

32. Admit.

33. Admit.

34. Admit.

35. Admit.

36. Admit the first and second sentences. The third sentence is a conclusion of law, as to which no response is required, but to the extent a response is required, denied.

37. Admit.

38. Admit, but aver that fractions of seats are not allocated among the states.

39. Admit, but aver that no method has allocated fractions of seats.

40. Admit, but aver that the statute refers to the "method of equal proportions."

41. The first sentence is denied. The second sentence is a conclusion of law, as to which no response is required, but to the extent a response if required, denied.

42. Denied.

43. Admit.

44. Admit.

45. Admit.

46. Denied.

Paragraph 47 through 56 are conclusions of law, as to which no responses are required, but to the extent that a response is required, all paragraphs are denied.

57. Admit.

58. Paragraph 58 is a conclusion of law, as to which no response is required, but to the extent that a response is required, denied.

The remainder of the Complaint sets forth plaintiffs' prayers for relief, as to which no response if required, but to the extent a response is required, denied.

Defendants deny all averments in the Complaint not hereinbefore otherwise answered, and respectfully prays that this Court:

(A) dismiss plaintiffs' Complaint with prejudice; and,

(B) grant defendant such further and other relief as this Court deems appropriate.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

WAYNE A. BUDD
United States Attorney

JUDITH S. YOGMAN
Associate U.S. Attorney

/s/ Sandra M. Schraibman
SANDRA M. SCHRAIBMAN

/s/ Mark H. Murphy
MARK H. MURPHY

Attorneys, Department of Justice
Civil Division, Room 3708
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone (202) 514-5124

Attorneys for Executive Branch Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular mail this 1st day of August, 1991 to the following:

Counsel for Plaintiffs

Dwight Golann
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Mass. 02108

/s/ MARK H. MURPHY
Mark H. Murphy

EXCERPTS FROM ADMINISTRATIVE RECORD

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

OCT 15, 1969

Alfred Meisner, Esq.
Deputy Assistant General Counsel
Department of Commerce
Washington, D.C. 20230

Dear Mr. Meisner:

This is in response to your request for our views concerning the legality of procedures the Director of the Census proposes to adopt in the enumeration of inhabitants of the United States—primarily military personnel, civilian employees of the government, and their dependents—who are abroad on the enumeration date of the Nineteenth Decennial Census. The Director proposes to secure information as to the "home State" of such persons and to allocate such persons to their respective home States. Persons living abroad would then be included in the total populations of their respective home States in the statement of State populations the President is required to send to the Congress under 2 U.S.C. 2a(a). That statement forms the basis for allocating Representatives to the Congress among the States.

As you know, the proposed home State allocation procedure represents a departure from past practice with respect to persons living abroad. The practice between 1900 and 1960 was to include such persons in the total

population of the United States, but not to include them in the total population of any State. In 1949, the Attorney General rendered an opinion with regard to the legality of that practice. He concluded that the practice was within the discretion of the Director of the Census and valid. 41 Ops. Att'y Gen. 31.

We understand that the factors which led to the Director's former practice with regard to enumeration of persons living abroad—primarily, difficulties in securing reliable information and substantial expenses of allocation—are now largely inapplicable, that it has become entirely feasible to make the proposed allocation to home States. In support of a discretionary judgment to adopt the proposed allocation procedure, it is reasonable to assume that many, if not most, persons of voting age living abroad vote in their home States and consider themselves to be represented in Congress by members from their home States. The constitutional provisions and statutes relating to the taking of the census and referred to in the Attorney General's opinion of 1949 have not been changed since that time. Finally, the decisions of the Supreme Court relating to apportionment of congressional districts within States and equality of representation in State and local governmental units have no bearing on the legality of the proposed allocation procedure. We conclude, therefore, that the Director of the Census may, in his discretion, validly adopt that procedure. We express no opinion, of course, as to the policy considerations which may be involved.

Sincerely,

/s/ WILLIAM H. REHNQUIST
William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

Statement of
Mr. Robert L. Hagan
Deputy Director
Bureau of the Census
Before the
Subcommittee on
Census and Population
House of Representatives
September 15, 1976

Madam Chairwoman, I appreciate your invitation to appear before this Subcommittee to provide you with background information concerning the Census Bureau's current plans relating to the "place of residence" concept for the enumeration of the population in the 1980 census.

In conducting the decennial population census of the United States, the Bureau of the Census has the responsibility to enumerate every person in the United States, insofar as possible. Title 2, Section 2a, of the United States Code, concerning the use of decennial census figures as the basis for the reapportionment of Representatives, states that

> "the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under . . . each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled . . .".

In determining the "whole number of persons in each State", the Bureau of the Census counts each person as an inhabitant of a place of residence that is defined as the person's usual place of residence. The Act of 1790 providing for the first decennial census stated that persons were to be enumerated at their "usual place of abode" and that persons "without a settled place of residence," shall be counted "where he or she shall be" on census day and that

"every person occasionally absent at the time of the enumeration" shall be counted "as belonging to that place in which he usually resides."

In the 1970 census, the Census Bureau, in accordance with practice dating back to 1790, counted each person enumerated as an inhabitant of his usual place of abode or residence. The concept of usual place of residence is general construed to mean the place where the person lives and sleeps most of the time. The place is not necessarily the same as the person's legal residence, voting residence, or domicile.

In order to implement the policy of counting persons as inhabitants of their usual place of residence, it has been necessary to establish specific residence rules for certain categories of persons whose usual place of residence is not immediately clear.

I have attached to my statement a table of residence rules which was used by enumerators in 1970. In general, persons were counted as members of the household where they were living on census day. Also included as members of the household on that date were persons who were staying or visiting there who had no other home, and persons who usually lived in the household but who were temporarily absent on a visit, business trip, vacation, etc.

These rules of residence are being reexamined now, as the Census Bureau makes its plans for the conduct of the 1980 census. For most of the population, the residence rules, which are given in a summary form on the census questionnaire, are easy to understand and apply. However, I wish now to review what our current plans are for some unique population groups.

Armed Forces residing in the United States.—In the 1970 census, as in every previous census, members of the Armed Forces living on military installations in the United States were counted as residents of the area in which the

installation was located. Similarly, members of the Armed Forces who were living off the military installation were counted as residents of the area in which they were living. Counting the members of the Armed Forces in this manner is in accord with the usual-place-of-residence concept since these persons were enumerated at the place in which they usually eat and sleep.

This method of enumerating Armed Forces was challenged in court in 1970. The Borough of Bethel Park, Pennsylvania, brought a suit which raised questions regarding the propriety of certain procedures established by the Bureau of the Census for taking the 1970 census. The procedures questioned related to the enumeration of members of the Armed Forces, college students, and inmates of institutions. Regarding Armed Forces, the plaintiffs questioned the procedure whereby members of the Armed Services stationed in the United States were enumerated as inhabitants of the specific location where they were living at the time of the census, rather than in the States which such individual's considered their legal residence. However, the United States Court of Appeals held that the Bureau of the Census properly enumerated members of Armed Services stationed in the United States as inhabitants of the place where they were living at the time of the census, Borough of Bethel Park v Stans (449 F 2d 575 (1971)). I have attached to my statement a copy of the Court's decision.

Since the enumeration of Armed Forces in the United States as residents of the area where they are stationed has been the practice in every decennial census, and is in accord with the usual-place-of-residence concept, the Census Bureau plans to continue to follow this same procedure in the 1980 census.

However, the Bureau is proposing a revision of one procedure that was used in the 1970 census for the enumera-

tion of certain members of the Armed Forces. In 1970, crews of U.S. Navy vessels, excluding those deployed to the overseas fleet, were counted as living on board the ship and the entire ship's crew was counted as residents of the home port of the vessel. Since some members of the ship's crew may be actually living in the home port or an adjacent area with their families when the ship is docked at the home port, rather than on board ship, more equitably distributed population counts for these areas would result if these crew members are counted as residents of the specific areas rather than aboard ship. The Bureau is now investigating the feasibility of making this change in enumeration procedures.

College students.—In the censuses of 1950, 1960, and 1970, college students were enumerated as inhabitants of the localities in which they were living while attending college. Prior to the 1950 census, most college students were enumerated as inhabitants of the States in which their parents maintained their homes. The change in procedures was made, beginning with the 1950 census, based on the recommendation of a study conducted in 1948 by the Bureau's Technical Advisory Committee on General Population Statistics which considered the impact of the sharp increase in the number of college students, both in total and in the number living at college, on the census count. It was found that under the procedure used prior to the 1950 census, the census failed to count a number of college students who were not reported at either their parental home or at their college.

Another reason for the change from counting college students at their parental home to counting them where they lived while attending college was to eliminate the inconsistency between the way college students were enumerated and the way all the other major population categories were enumerated.

Counting college students at their parental homes rather than at their usual residence while attending college would provide unrealistic results for many college towns where thousands of students spend a major part of the year. The students live in the community, draw on its resources, rely on its public services, and patronize its business establishments.

In an opinion of the Attorney General, dated March 25, 1950, (41 op. Atty. Gen: 59 (1950)) it was held that the judgment and discretion which the statutes have reposed in the Director of the Census, subject to the approval of the Secretary of Commerce, were broad enought to permit the adoption of a procedure whereby a student who was away from home attending college would be considered and enumerated as a resident of the enumeration district in which the student lived while attending college.

In the aforementioned suit brought by the Borough of Bethel Park, Pennsylvania, regarding the procedures used by the Census Bureau for taking the 1970 census, the plaintiffs challenged the Bureau's policy of enumerating college students where they lived while attending college rather than at their legal residence. However, it was the opinion of the court that the decision of the Bureau concerning the enumeration of college students was reasonable, since such students usually eat, sleep, and work in the State where the college is located.

For the 1980 census, the Bureau plans to continue to count college students as residents of the locality in which they live while attending college.

Students below college level.—Students who were away from home attending school below the college level, except those at institutional-type schools, were counted as residents of their parental household in the 1970 census. In the Court's opinion in the Borough of Bethel Park case, this method was found to be acceptable since these

students below the college level could properly be ascribed to a parental home, whereas older college students, at a transitional state of their lives, could not be. Moreover, the Court noted that:

> It is unlikely that the number of students in a school below the college level who are in attendance in a state other than that of their parental home will have an appreciable effect upon the population of either state or even the respective political subdivisions.

For the 1980 census, the Bureau plans to continue to count students attending boarding schools away from home as part of their parental household.

Persons in institutions.—In the 1970 census, persons residing in institutions where individuals usually stay for long periods of time, such as penitentiaries, mental institutions, homes for the needy or aged, or hospitals for the chronically ill, were enumerated as residents of the locality where the institution was located. People in this category, as distinguished from, for example, those in a hospital for a short period, often have no other fixed place of abode, and the length of their institutional stay is often indefinite. Patients in short-term wards of general hospitals were not counted at the hospital if they had a usual place of residence elsewhere. This procedure of enumerating persons in institutions is in accord with the concept of usual place of residence, and in connection with the suit brought by the Borough of Bethel Park, it was the opinion of the Court "that the decision of the Bureau as to the place of counting institutional inmates has a reasonable basis."

For the 1980 census, the Census Bureau plans to continue to count persons living in institutions as residents of the localities where the institutions are located.

Mobile population groups.—Persons with no usual place of residence and certain mobile population groups

present unique problems. As the general rule, such persons were counted in 1970 at the place they were staying at the time of the census to ensure their coverage in the census. Examples of our procedures for different groups are as follows. Persons staying in hotels, motels, YMCA's, and similar places were asked if they have a usual residence elsewhere. If they did not, they were enumerated where found. Persons in missions, jails, and similar places were also enumerated where found. Persons in places with shifting populations, such as construction camps and camps for migratory agricultural workers, were also enumerated where they were located at the time of the census. The Bureau plans to follow this same procedure in the 1980 census to be sure that this segment of the population is enumerated as completely as possible. Because of our concern with full coverage for these difficult groups, I should add that the Bureau plans to explore and test a wide variety of approaches to be sure, insofar as we can, that these mobile groups, such as migrant workers, are aware of the census, are aware of the need to be counted, and have the opportunity to be counted.

Americans abroad.—As in the 1970 census we plan again to make special provision for the enumeration of persons abroad including members of the Armed Forces, their dependents, civilian American citizens employed by the Federal Government, their dependents, and crews of merchant marine vessels at sea. In addition, in 1970 an effort was made to obtain reports for private citizens who were living abroad for long periods of time; however, of necessity such reporting was on a voluntary basis and thus not as complete as for the other groups. Accordingly, we plan to explore approaches which might permit us to obtain a much wider representation of this group in 1980. As noted earlier, persons who were only temporarily abroad

were to have been reported by their families or neighbors in the United States.

Because of the large number of Americans overseas at the time of the 1970 census, American military and civilian personnel working for the Federal Government and the dependents of these groups who were abroad were allocated to their home State for purposes of congressional apportionment. This was not done in any previous census.

However, we do not believe that it is necessary to allocate this population group back to their home State for apportionment purposes in 1980 for the following considerations:

1. They were not included in the apportionment population in any census other than 1970.
2. They were included in 1970 only because of the large buildup in the Armed Forces overseas during the 1960's because of the Vietnam conflict and not because of any change in the constitutional requirements or other laws governing the apportionment procedure.
3. The data on "home State" of those overseas are of an unknown reliability. In fact, a recent study conducted by the Advisory Commission on Intergovernmental Relations with recommendations for the Congress, has shown that some servicemen may select as their "home State" one with low or no income taxes rather than their "true" home State.[1]
4. Finally, it should be noted that the number overseas has been cut almost in half from 1.6 million in 1970 to about 900,000 in 1975.

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[1] *State Taxation of Military Income and Store Sales.* A Commission Report A-50, Advisory Commission on Intergovernmental Relations, Washington, D.C., Government Printing Office, July 1976.

I have prepared a more complete statement concerning this matter which, with your permission, I should like to have inserted into the record. In this more complete statement, there is a description of the influence on apportionment of the inclusion of the overseas population. In 1970, their inclusion only affected the 435th seat, and based on current estimates of the population of the States and the population overseas, their inclusion makes no change in the apportionment of the Representatives among the States.

Thank you, Madam Chairwoman, for the opportunity to present this statement. I will be pleased to answer any questions which you may have.

Attachment A

THE APPORTIONMENT POPULATION IN 1980

In defining the apportionment population for the 1980 census, it must be determined if the American military and civilian personnel of the Federal Government and their dependents who are counted abroad in the 1980 census should be allocated to their home States and included in the population of those States for the purposes of apportionment, as they were for the first time in 1970, or if they should be excluded from the apportionment population as they were in previous years.

For a number of important reasons, the Bureau is now planning to return to the traditional approach in 1980 and not include the American overseas population in the apportionment population for 1980.

In 1970, the apportionment population in each State was redefined to also include (for the first time) all American military and civilian personnel of the Federal Government from that State who were counted abroad as of April 1, 1970, and their dependents who were with them. This overseas population was allocated to "home State" for purposes of congressional apportionment.[1]

The decision to include these selected segments of the population overseas in the apportionment population was based primarily on the fact that unprecedently large

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[1] For most members of the Armed Forces, "home State" meant their "home of record" as it appeared on military records; for other members of the Armed Forces and for civilians overseas it meant the "home State" reported on the 1970 overseas census report form. The phrase "home State" was used by American overseas to designate their area of usual residence in the United States which may be their present or last voting residence, legal residence, the "home" specified in their official records, etc.

numbers of Federal Government military and civilian personnel would be overseas at the time of the 1970 census, and followed discussion with committees of the Congress. The decision was not made because of any new specific constitutional interpretation or requirement, or other law. In 1949, for example, the exclusion of the population overseas in the apportionment population had been deemed acceptable by the Attorney General (41 op. Atty. Gen. 31 (1949)).

Adding the 1.6 million Americans overseas to the counts of the States for apportionment purposes in 1970 made very minor changes in the population counts of the individual States. The addition of these selected groups abroad to the resident population for the purposes of apportionment increased the resident population by 0.8 percent. The relative increase for the individual States ranged from a high of 1.9 percent for the State of Hawaii to a low of 0.5 percent for the State of New York.

In 1970, the ratio of the apportionment population to Representatives was 469,088 persons, and the ratio of the resident population to Representatives was 465,468 persons. The attached table shows that the number of persons abroad allocated back to their home States in 1970 ranged from 145,729 persons for the State of California to 1,894 persons for the State of Alaska. The only State besides California to which more than 100,000 persons were added was Texas, which was increased by 102,057 persons.

The absolute number of persons overseas who were allocated back to their home States for the purposes of apportionment in 1970 was relatively small for any one State. The relative distribution of the population among the States was virtually the same both for the resident population and for the apportionment population, as adding Americans overseas to the counts of the States for apportionment purposes in 1970 did not change the percent distribution of the population among the States at the one decimal level, except for rounding (see attached table).[2]

However, the assignment of the population overseas back to their home States did make a difference in the number of Representatives apportioned among the states. If the 1970 apportionment had been based on the resident population only, excluding the overseas population, Connecticut would have had one more seat (for a total of 7) and Oklahoma one less seat (total of 5) than resulted from the official apportionment based on the resident population plus the overseas population.

As of September 30, 1975, the number of Americans overseas in the Armed Forces, working as civilian employees of the Federal Government, or as dependents of the Armed Forces or of civilian employees has been cut almost in half from 1.6 million to approximately 930,000.

If the apportionment calculation were based on Census Bureau estimates of the population of States for 1975 and the estimated 930,000 Americans overseas (assuming that those overseas were distributed among the States in the same proportions as in 1970), then there would be no difference in the apportionment of Representatives among the States whether the apportionment population included or excluded the overseas population.

To obtain information on the home of record of the overseas population and to tabulate the information secured for each State was a complicated process in 1970 which required a considerable expenditure of time and funds to complete. The data were collected from various

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[2] Although the figures in the attached table appear to indicate that Arkansas and California differed by 0.1 between their proportion of the apportionment population and their proportion of the resident population, this is due only to rounding. The actual difference for Arkansas was 0.002 and the difference for California was 0.005.

sources and forms needed to count the overseas population. Department of Defense tabulations of "home of record" for members of the Army, Air Force, and Marine Corps stationed overseas provided a part of the needed data. Census forms were used to obtain information from the overseas land-based Navy personnel, military dependents, and Federal employees and their dependents living abroad for an extended period. Other census forms were used to obtain information from members of the Armed Forces living in barracks in Puerto Rico and the outlying areas of the United States and from members of the Armed Forces stationed on U.S. Navy and Coast Guard ships at sea.

All of these forms had to be hand-sorted as they were received from military sources and from the U.S. diplomatic and consular posts. They were also checked off against various control cards indicating ships and locations from which returns were expected. A staff of 25 to 30 clerks worked for several months to hand-process the hundreds of thousands of questionnaires. Finally, counts of the number of persons according to "home State" were made from the assembled forms, and these counts, along with counts of the military abroad received on tape from the Department of Defense, were added to the State totals for apportionment purposes. All of this processing had to be completed prior to the transmittal of the apportionment figures to the President.

In 1970, the allocation of Americans overseas back to their home States affected the apportionment for only the last Congressional seat. At the present time, the apportionment would be the same whether those overseas were included or excluded, based on current estimates of the population in each of the States and current estimates of the overseas population. (The exact effect upon the apportionment of Representatives among the States of including

or excluding the overseas population in 1980 are unknown and cannot be determined at this time. These effects are dependent upon the interaction of the exact distribution of the resident and overseas population among the States and the operation of the particular mathematical formula, known as the method of equal proportions, used to compute the apportionment.)

We do not believe that it is necessary or desirable to allocate the overseas population back to their home State for apportionment purposes in 1980. The following considerations lead us to this conclusion:

1. Americans abroad were not included in the apportionment population in any census except 1970.

2. Americans abroad were included in the apportionment population in 1970 only because of the very large number who were overseas at that time, following the build-up in the Armed Forces overseas in the 1960's because of the Vietnam conflict, and not because of any change in the constitutional requirements or other laws governing the apportionment procedure.

3. The data on "home State" of those overseas are of an unknown reliability. In fact, a recent study conducted by the Advisory Commission on Intergovernmental Relations, with recommendations for the Congress, has shown that some sevicemen may select as their "home State" one with low or no income taxes rather than their "true" home State.[3]

4. The number of Americans abroad has been cut in half—from 1.6 million in 1970 to 930,000 as of September 30, 1975.

In view of the extra costs and complexities, technical uncertainties, and minimal (if any) impact, the Bureau

[3] *State Taxation of Military Income and Store Sales,* A Commission Report A-50, Advisory Commission on Intergovernmental Relations, Washington, D.C., Government Printing Office, July 1976.

plans to resume in 1980 the traditional approach of not including Americans overseas in the apportionment population.

ENUMERATION OF AMERICANS LIVING ABROAD

Meyer Zitter
Consultant

ENUMERATION OF AMERICANS LIVING ABROAD*

INTRODUCTION

At the present time (mid-1986) estimates suggest that there are about 1,000,000 Americans living overseas closely affiliated with the U.S. government, who, in past Censuses, were enumerated in one fashion or another. These include slightly more than one half million members of the Armed Forces, about 60,000 civilian citizens employed by the Federal Government, and about 450,000 family members of these two groups. Crews of U.S. merchant vessels outside of U.S. territorial waters also add to this group.

There is another population group, probably even larger than the above, of uncertain size, distribution, and imprecise definition with varying degrees of affiliation or association with the folks back home which also warrants attention at Census time. This is the "other citizen" overseas component, numbering, perhaps, in excess of 1 million. Efforts to count them were made in several past censuses but with very little apparent success, i.e. extremely poor coverage.

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* Prepared by Meyer Zitter, Consultant. Author's note: This report draws heavily on materials (reports, memos, letters, etc.) made available by the Census Bureau for the present purpose. These materials cover several decades of Census taking and planning. Data and references were freely extracted and used usually without precise citation or attribution. Acknowledgement and thanks are particularly due to Bob Speaker and Mark Littman of the Census Bureau's Population Division for the unlimited use of their material and time. One document (internal) in particular should be cited however and that is "1990 Research Report on Enumeration and Residence Rules," prepared by Mark S. Littman and Robert Speaker, Population Division, April 1985.

Prepared as Background document for Study of Census Residence Rules Conference, Washington, D.C., December 1986.

The report describes the Censuses past practice of handling and enumerating these groups, the concerns and responsibility of including them in the apportionment count, i.e. allocating them back to states (or even substate) for apportionment purposes, and discusses various aspects to be considered in determining the role of this group in the 1990 Census.

In the context of this report and in reference to the census taking process and census universe, the terms "overseas population" and "population abroad" are used interchangeably.

For census taking purposes and for understanding the Census in handling the overseas population, at Census time, the population abroad has been classified into the following categories:

- ARMED FORCES INCLUDING ALL BRANCHES OF SERVICE
- CIVILIAN CITIZENS EMPLOYED BY THE FEDERAL GOVERNMENT
- DEPENDENTS OF FEDERAL EMPLOYEES, CIVILIAN AND MILITARY
- CREWS OF MERCHANT VESSELS
- "OTHER U.S. CITIZENS" LIVING ABROAD

BACKGROUNDHISTORY OF ENUMERATION

Selected grops of Americans living abroad have been counted in the decennial census since 1900. However, prior to the 1950 Census, these counts were based on administrative records of the members of Armed Forces and diplomatic personnel abroad. In the 1940 Census, for example, the War and Navy Departments provided the Census Bureau with information on the number of their personnel stationed abroad, and the State Department furnished the number in the diplomatic service abroad. Illus-

strative of the levels involved, Census reports show the following administrative counts of "Military and Naval Servicemen" abroad, 1900 to 1940:

(in thousands)	
1900	91
1910	56
1920	117
1930	89
1940	119

The 1950 Census was the first census to make special provisions for the actual enumeration of members of the Armed Forces abroad, their dependents living with them, the civilian American citizens employed by the United States Government abroad, and their dependents living with them. This enumeration in 1950 was conducted through cooperative arrangements with the Departments of Defense and State. Basically, the Census Bureau provided these agencies with the *Overseas Census Report* (Form P-5), they were distributed, collected, controlled and returned to the Census Bureau. Census literature (or at least discussion with "old timers") suggests limited effort to count "other citizens", i.e. American citizens living abroad not affiliated with the U.S. government but the effort did not yield any usable figures.

Overall, slightly less than one half million persons affiliated with the U.S. government were counted overseas in 1950 by the above procedures (Appendix Table 1). Yet is is noteworthy that there was much concern during the planning phases that the number might be significantly higher in this immediate post World War II period (a figure of 1.8 million appears in Census Bureau memoranda but which also includes employees of private corporations and organizations, tourists, in addition to those actually covered). And it was in anticipation of possible large numbers

abroad that the then Director of Census sought the formal opinions from the Attorney General on the legality of the Census Bureau plans at that time, i.e. to only enumerate the "affiliated" Americans living abroad but not to include them in the total population figures for any state or in the total population of continental U.S.

In the 1960 Census, these same overseas groups were again enumerated through the cooperation of the Department of Defense and State, and, in addition, a more serious effort was made to obtain reports from private citizens who were abroad for a long period of time. The reports from "other citizens" were obtained on a voluntary basis and probably seriously undercounted the true number of Americans abroad. About 1.4 million Americans abroad were counted (Appendix Table 1).

As in 1950, these counts were not included in the total population for any state or in the total population of the 50-state area. Furthermore, there didn't appear any questions or discussions about a possible role in the apportionment process.

For the first time a separate report on AMERICANS OVERSEAS was published as part of the 1960 Census, Volume III PC(3)1C Selected Area Reports providing a broad range of social and economic characteristics of the civilian population abroad.

In the 1970 Census, American overseas were again enumerated: The Department of Defense provided the Census Bureau with tabulations by age, sex, race, marital status, education, and state of "home of record" for members of the Army, Air Force, and Marine Corps stationed overseas as of April 1, 1970. As a result these persons were not required to complete census questionnaires.

The Department of Defense distributed and collected Census-prepared questionnaires (Form D-21) for members

of land-based Navy and for Coast Guard personnel, for military dependents, and for its own civilian employees overseas and their familiies.

The Department of State handled the enumeration of other civilian government employees, their dependents, and other Americans residing abroad through the U.S. embassies and other diplomatic and consular posts. The enumeration of these "other" citizens was done necessarily on a voluntary basis—it was up to the individual to trek to the nearest consulate or embassy to obtain a questionnaire. Based upon a postcensal inquiry of the consulates, it appears there was wide dispersion in the degree to which they extended themselves to insure an accurate count. Some consulates ran elaborate ads, sent forms to persons registered at the consulate with franked return envelopes, etc., while others did virtually nothing. Many indicated a willingness to cooperate to a fuller extent if they had been given relatively small sums of money to run ads, or hire temporary staff to handle the mailing to registered Americans (the consulate in Mexico, for example, said there were 25,000 on their list and they didn't have the time or money to mail a form to each.) About 1.7 million persons were counted overseas in 1970 including 1.1 million members of the Armed Forces and 236,000 "other citizens."

Even a casual review of the "other citizen" category would suggest serious shortcomings. In fact, data from several independent sources indicates that the counts of civilians were terrible, particularly in Canada and Mexico. Globally, the Census Bureau counted some 680,000 civilians overseas in 1970 (including the assumed reliable counts—over 400,000—of those affiliated with the U.S. government); yet; "data from foreign census indicates there were at least 1.2 million U.S. civilian citizens overseas in 1970; and, theoretically, there may have been over 2 million," (from internal census memorandum).

The 1970 Census was the first, and only one, in which the main overseas population enumerated were included as part of the "apportionment" population and used in determining the distribution of seats in the House of Representatives. The groups included were: Federal employees, military and civilian, and their dependents who were counted overseas. For apportionment purposes, this group was augmented by corresponding groups living in an *outlying area* of the United States, i.e., except Puerto Rico, who reported a state of their "home of record." Persons living in such outlying areas of the United States and in Puerto Rico are not considered for present purposes as part of the "overseas" population.)

There appeared to be two main reasons for pursuing this course in 1970 as compared to earlier census. One, the larger number of persons expected to be overseas at the time of the April 1970 enumeration planning estimates cited in mid-1969 suggested these might be as many as 1.3 million members of the Armed Forces, 40,000 Federal civilian employees and close to 500,000 dependents of these two groups (these figures were not too far from the total eventually counted and used in the apportionment count—see above) and two, recent court decisions in redistricting cases and one man, one vote concerns. Because of these two factors there was growing interest in Congress and elsewhere in having persons enumerated overseas included in population figures used for apportionment purposes.

With respect to enumeration, data on Army, Air Force, and Marine Corps personnel stationed abroad were provided by the Department of Defense, rather than by enumeration forms, U.S. Navy and Coast Guard, as well

as American Merchant Marine personnel were enumerated on military and maritime personnel forms (D-21).

Federal civilian employees, dependents of all Federal employees, including families of military persons living abroad, and "other" citizens were enumerated on an *Overseas Census Report* (Form D-23). (Appendix A-1)

As in 1960, a special report *Americans Living Abroad,* PC (2)-10A was published as part of the 1970 Census Subject Reports series.

In 1980, no attempt was made to enumerate directly any of the overseas population groups. Administrative counts (but apparently no characteristics) for Armed Forces and Federal civilian employees and their dependents overseas were obtained from the Department of Defense and the Office of Personnel Management, but no data or count was obtained on the number of "other civilian citizens" who were not affiliated with the Federal government. Furthermore, none of the overseas population groups were included in the 1980 apportionment population, i.e. they were not allocated back to "home-state" as in 1970, for purposes of Congressional apportionment.

The reasons cited for not including them in the apportionment process included:

A) They were not included in the apportionment population in any census other than in 1970,

B) They were included in 1970 only because of the large build-up in the Armed Forces overseas during the 1960's (Vietnam War) and not because of any change in the constitutional requirements or other laws governing the apportionment procedure. (There is no legal requirement to include Americans overseas in the apportionment population),

C) The data collected on "home-state" of those overseas are of unknown reliability. A study conducted by the Advisory Commission on Inter-Governmental Relations had shown that some servicemen may select as their "home state" one with low or no income tax rather than their "true" home State.[1]

D) The number of Armed Forces overseas was smaller than in 1970—about half as much—as shown below.

SELECTED OVERSEAS POPULATION GROUP	1980	1970	1960
	(in thousands)		
ARMED FORCES	515	1,058	610
CIVILIAN CITIZENS EMPLOYED BY FEDERAL GOVERNMENT	48	56	38
FAMILIES OF ABOVE	433	371	506
TOTAL	996	1,485	1,154

Also, the 1970 process left a somewhat ambivalent situation of using one state total for reapportionment purposes and a different state total for all other tabulations including redistricting. This situation came about because it would have been impractical if not virtually impossible to collect the detailed addresses required to geo-code down to the precise sub-state area.

In addition, as stated, in 1980 no effort was made to collect any information on "other civilian citizens" abroad, i.e. those not connected with the Federal government. The main reasons cited include costs, lack of any mandate for collecting such data (the Director of the Census appears to

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[1] *State Taxation of Military Income and State Sales,* A Commission Report A-50, Advisory Commission on Intergovernmental Relations, Washington, D.C., GPO July, 1976.

have wide discretion, with the approval of the Secretary of Commerce with regard to the enumeration of the overseas population) the past inability to obtain such facts in a reasonably complete manner, and the lack of Congressional guidance as to which groups to include (e.g. should we include only those eligible to vote, those with intention to return, those tied financially to the U.S., such as Social Security beneficiaries or employees of U.S. corporations, etc.) Estimates of this segment of the overseas population or the number of "eligibles to be included" vary widely and the size and distribution uncertain making any planning process extremely difficult (See Appendix Table 2, for example).

Thus, in 1980, the only census data published on the overseas population was the overall counts based on administrative records (Appendix Table 1)

FUTURE PERSPECTIVES:

POPULATION ABROAD AFFILIATED WITH U.S. GOVERNMENT:

As we look ahead to 1990, a review of the past practices relative to the overseas population summarized above is most instructive. At each of the past several censuses, the treatment of overseas population received considerable attention from the Census planners, and, different decisions reached relative to their treatment at different censuses reflecting the various pressures and issues of each particular period. If the 1970 Census can be considered the high watermark in enumeration of the overseas population, at least that segment affiliated with the U.S. government, the recent 1980 experience can be considered the ebb-tide of concern, at least statistically, with our overseas population. The data obtained for the "affiliated population" was minimal—counts only obtained through ad-

ministrative records. No effort was made to reach "other citizens abroad." The factors in arriving at this decision were very compelling: money, much small numbers (size) compared to 1970, the lack of any mandate to collect such data (nobody cared) and in the case of "other citizens" extremely poor coverage, lack of guidance on whom to enumerate, and lack of knowledge on its size, composition and distribution. What it may really come down to is that anything that distracts from the main Census event represents an unnecessary risk and shouldn't be undertaken unless *there are strong, compelling reasons to do so, such as a Congressional mandate.*

For 1990, then, we need to reexamine the nature of the overseas population and its attachment to the United States. Is the overseas group to be considered a mere adjunct to the main U.S. resident population or something more permanent and an integral part of the whole?

The Census identifies at least four distinct groups each with different degrees of attachment or affiliation with the U.S. There is first the military (Armed Forces) and their families living with them. These clearly have the closest ties and strongest claim psychologically, if not socially or economically, to the U.S. population as a whole:

- they are abroad involuntarily,
- have specified periods of service and will return home,
- closely tied to the security of our nation,
- closely tied to the U.S. government,
- deeply effected by legislation and other congressional actions,
- still under U.S. jurisdiction, law/rules and regulations,
- eligible to vote (absentee) in U.S. elections,
- family ties.

In general this group would appear to be part and parcel of the U.S. population although not tied to any particular state.

The next group perhaps almost equal to or a notch below the military in the ties to the nation is civilian employees of the U.S. government (and their families living abroad with them) even though such employees serve abroad voluntarily rather than by assignment as in the military. Nevertheless, the factors mentioned above apply to them as well for the most part.

These above groups are the easiest to enumerate, and as summarized earlier have been enumerated and counted in one way or another over the years of census taking. Because of the nature of their attachment to and affiliation with the U.S. government and the nation as a whole, it appears desirable to develop a comprehensive set of data, demographic, social, and economic as part of the decennial census effort, making an important addition to the federal statistical data base. These groups are easily accessible, their whereabouts generally known, control counts available, and other federal agencies (e.g. defense, state) can be enlisted to assist and/or coordinate the flow of material, (the 1970 Census experiences would be useful in this connection.)

The users or potential uses of such expanded data for this universe have not been well documented in the past. It is possible, as has been suggested, that very little use will be made of such data. But I would venture that such will not be the case in present environment of an information society. If nothing else, the social, demographic and economic characteristics and living conditions should be of extreme importance to federal agencies for the planning, recruitment, and maintenance of its employees abroad.

"OTHER CITIZENS" ABROAD:

This group living abroad at this time of the Census represent those American citizens not affiliated with the U.S. government, and is the most difficult to comprehend and approach for enumeration purposes. 1970 was the last census any attempt was made to enumerate such persons and was largely unsuccessful in terms of complete coverage (as per above). Persons included in this category range from U.S. citizens employed by large American (or foreign) corporations, students, United Nations employees, Americans retired abroad and/or social security beneficiaries. The precise size and geographic distribution are not known; Appendix Table 2-4 show the wide range of possibilities. For example, a recent study of foreign census (Table 2) shows an overall figure of close to 1 million U.S. born persons living in other countries based on data from foreign censuses. On the other hand, reports in 1984, from the U.S. Foreign service show a figure (also in Table 2) that's almost twice as high (1.8 million) with significant differences by country. There were over 300,000 Social Security beneficiaries abroad in December 1985 (Table 3). A distribution by year since last residing in U.S. is shown in Table 4 for a different point in time. BEA, International Investments, reported 41,000 U.S. citizen employees (plus an unknown number of dependents) of major U.S. corporations with foreign affiliates (based on a 1982 survey),[2] and in tax year 1984 about 470,000 returns with 1,028,000 exemptions were filed from overseas (including military personnel).

With regard to affiliation or association with the U.S.: the group ranges from those who have definite plans or commitments to return to those only still marginally in-

[2] Conversation with Mr. Kruer, BEA, International Investments.

volved with U.S. affairs to those long time expatriates who have become part of their new (old?) country.

Considering the diverse nature, unknown size, and distribution, a decision to adequately enumerate this group should be preceded by studies on such a basic question as "whom to enumerate?" i.e. citizens only, only prior residents, only those with plans to return to the U.S. and similar questions. Tests also need to be carried out on how to reach these individuals directly i.e. to direct a census form to each individual or family, or to as many as possible. In addition to the fullest cooperation and assistance of the State Department and other U.S. agencies involved in overseas work, large corporations, educational institutions, and other organizations with substantial overseas interests, would also need to be solicited and involved.

The reasons stated for not enumerating this group in 1980 included the inability, without substantial expenditures of time and money, to achieve a complete count. Major problems associated with achieving an accurate count of Americans living abroad include the lack of up-to-date mailing lists, the voluntary nature of overseas enumeration, and the definitional problem of who should be included. These arguments are still sound but, not as compelling. The problems are not unsurmountable given time and resources. A start needs to be made if the issue of enumerating overseas Americans is to be resolved. As one census is often the pretest environment for new ideas and procedures before full integration in the census process occurs, defining the overseas group, and learning how to enumerate Americans overseas will require a similar process.

The uses of data on Americans overseas have not been well-documented; but the most important need is by the Census Bureau itself in developing postcensal population estimates and ultimately for measuring census coverage.

And measuring census coverage is one of the Bureau's highest priorities. Thus, it is extremely important to try to resolve the many problems associated with enumerating the overseas population and 1990 could be the starting point.

Paralleling the 1990 census research effort, the Bureau should consider an earlier proposal it had for a CPS supplement on Americans abroad using the multiplicity (network) sampling techniques to address the problem. With this technique, CPS respondents are asked to report on specified relatives (parents, siblings, and children) who are American citizens or who once had a usual residence in the U.S. but are now living abroad. Estimates of the number of Americans living abroad are then developed by appropriate weighting. This type of supplement could provide "counts" of Americans abroad according to citizenship and military/civilian status; (but cannot provide a full range of characteristics including state of origin useful for coverage estimates for states among others). Parallel sample supplements of this nature could provide continual reading on the amount of "emigration" from the U.S. needed to maintain the quality of its population estimates program. These supplements coupled with the periodic census enumeration of the entire overseas population will fill an important gap in census coverage and in the Federal Statistical Data Base.

OVERSEAS POPULATION—SPECIAL GROUPS:

For most groups described above, usual residence was quite clearly overseas. However, for groups aboard ships at the time of the census—naval and other maritime personnel, a specific set of rules were established to make this determination. The determination for 1980 was as follows:

NAVAL PERSONNEL ABOARD SHIPS deployed to the 6th or 7th fleet on Census Day were considered a component of the overseas population and included in the administrative count of Armed Forces abroad. This was the procedure used in 1970 and it was not questioned prior to the 1980 Census. However, because of the Iranian crisis; Norfolk, Virginia; North Charleston, South Carolina; and a few other ports had abnormally large proportions of "their fleets" deployed on Census Day and these communities complained about the prospect of not being credited with these naval personnel. The basis on which the Census Bureau included such persons "overseas" was the belief that the length of deployment generally exceeds six months. Although this is not universally so, the Department of Navy recently indicated that the average deployment over the past five years is still approximately six months.

The issue here for 1990 appears to be to "keep it simple" by continuing to assign all deployed personnel regardless of length of time of deployment to the overseas component, or should length of time of deployment play a role with those deployed shorter time periods be assigned to their home port as is the case for the non-deployed universe.

MARITIME PERSONNEL:

Other than military ships, the only shipboard personnel enumerated (1980) were those on United States flag merchant vessels (i.e. United States flag ocean going, coastal and Great Lakes merchant vessels on lists obtained from the Maritime Administration, U.S. Department of Commerce). No attempt was made to enumerate persons aboard various other types of ships (e.g. those on inland waterways, fishing vessels, oil rigs). The Bureau assumed

persons on these ships had a usual residence ashore where they would be counted. If the ship was berthed in a U.S. port on Census Day but inside U.S. territorial waters the crew was enumerated as of the port of destination if inside U.S. or home port if outside of the U.S. Crews of U.S. flag vessels which were outside of U.S. territorial waters on Census Day were considered as "overseas" and were *not* enumerated at all. (In 1970 and 1960 such groups were enumerated as part of the overseas population. See Appendix – Table 1.)

APPORTIONMENT:

As indicated earlier, 1970 was the only census in which part of the overseas population was allocated back to states for apportionment purposes. In 1980, the Bureau reverted back to the traditional status of *not* allocating any overseas population for apportionment. Looking ahead to 1990 (and beyond) there seems to be strong reasons for continuing the 1980 practice regardless of the final decision on whom and how fully to enumerate the overseas population. Two main reasons, cited earlier, for not including the overseas population in the apportionment process still appear most compelling. These are:

1) No legal mandate, no constitutional requirement to do so, and
2) No reliable way of accomplishing the feat in a sound fashion. Data collected in 1970 on "home-state" was of unknown reliability.

Furthermore, there are different methods equally valid and defensible which could have been used but which would yield a different allocation. A variety of options exist for allocating military personnel in particular, viz:

– State of pre-service residence

- State of duty station prior to leaving for overseas post. This would be consistent with method of treating stateside military personnel.
- State of voting residence
- Pro rata distribution

Finally, the inability to assign such persons to sub-state areas, a requirement for redistricting, renders the whole overseas allocation process so much less viable and questionable. Thus barring any new Congressional mandates a guidance it would appear wise to continue its 1980 practice, and that of all earlier censuses (except 1970), not to allocate the population abroad to states for apportionment purposes.

ENUMERATION OF FOREIGN DIPLOMATS:

Diplomats and other persons living on the grounds of the embassy of a foreign country were not enumerated in the 1980 census (nor in earlier censuses). However, attempts were made to enumerate all other citizens of foreign countries *resident* in the United States, whether or not they were associated with the embassy or consulate of a country. (Citizens of foreign countries *temporarily visiting or traveling* in the United States were not enumerated since they did not meet the usual residence rules). This is essentially the same procedure used in 1970 and several prior censuses.

The decision not to attempt to enumerate persons living on the grounds of embassies is based on the fact that such grounds are considered "foreign soil" and off limits to unwarranted intrusion. The Census does not send enumerators to these places (nor were enumeration forms mailed). On the other hand, foreign diplomats and support staff living in housing units independent of embassies, legations, chanceries and consulates were enumerated (or attempts were made at enumeration) as long as they met the usual residence rules. As the 1980 residency rules clearly indicated, foreign citizens who were working in the United States on a long-term basis and living in regular housing units were to be counted.

The procedures resulted in some confusion in 1980 since foreign diplomats and support staff living in such housing units did not believe they were to be counted as members of the population of the U.S. But, as it was pointed out by the State Department that while it was all right to ask diplomats and their staffs the housing and population questions, the Census had to realize if they refused to be enumerated, he/she was immune to prosecution under Title 13 due to diplomatic immunity. As a practical matter, then enumerators may attempt to count such personnel, but refusals need to be accepted more readily. Enumerators shouldn't "press" for the information as is the procedure for other refusals.

Some problems surfaced in 1980 mainly because the State Department was not sufficiently briefed on census procedures so diplomatic staff could be alerted to the process. Better communications should avert any problem in the future. Changing residence rules and enumeration procedures to exclude this group from enumeration would create unnecessary additional control problems and make the Washington D.C. enumeration job too complex. The Bureau would need some method of flagging the addresses and write special procedures so enumerators will be alerted for those housing units containing "diplomatic" personnel and use special procedures for enumeration. Introducing such additional special procedures is bound to impact on the overall job of the enumeration.[3]

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[3] See U.S. Bureau of Census, 1990 Census Committee on Special Enumeration Procedures, Final Report, July, 1984.

SUMMARY:

Americans living overseas are made up of several diverse but distinctive groups each reflecting different levels of affiliation with the U.S. government, and/or U.S. military, but with claims to citizenship and (usually) prior residence in the U.S. Socially, and psychologically, if not legally, these groups may claim a right or entitlement, if you will, to be included as part of the decennial census, or the periodic American stock-taking, as it's occasionally referred to. And in this context represents a challenge to the census-takers (Census Bureau) to develop appropriate procedures and afford reasonable opportunities for this to happen. For the most part, these individuals meet the "usual" residence definition, or more precisely the non-resident rules (discussed here in other documents) i.e., clearly all of these persons had their usual place of residence at the time of the census outside of the United States ("overseas") but by virtue of being American citizens have a legitimate claim to be recognized and counted at their usual place of residence at the time of the Census, i.e. overseas. And, after several censuses of mixed coverage and less than uniform treatment the issue needs to be addressed with a view toward a permanent solution.

PLACE OF ABODE

Theodore G. Clemence

The Census of 1790 was taken under a law enacted on March 1st of that year by the first Congress assembled under the Constitution. The generic rules of residence we still observe appear in that law, which required the numbering of inhabitants at their usual place of abode, those without a settled place of residence to be enumerated "where he or she shall be" on Census Day, and those "occasionally absent" from home at the time of enumeration "at the place in which he usually resides."[1]

We explore the origins of this three-part concept, how it was elaborated in successive censuses, and conclude with some observations on the meaning of the term "inhabitants."

My pursuit of this topic began with a question: Were these residence rules for the first census followed or ignored? To answer that suggestively, but not scientifically, I chose a small and very unrepresentative sample of public men who had some official connection with the first census, and had two or more places of residence during the nine months allowed for the actual enumeration, which extended from August 2, 1790, through the end of April 1791.

My first sample case was President George Washington. Judging from the travel entries in his diaries, he was a man without a settled place of residence, who sometimes spent a good part of a year sleeping in taverns and the homes of friends.

Indeed, during the enumeration period of 36 weeks, the President was on the road for 16 weeks, visiting every State in the Union from Rhode Island to Georgia; 15 weeks at the seat of Government, and only 10 weeks at his home in Mount Vernon, Virginia.

But, his name appears in the Virginia census, where the assistant marshal whose district included Mount Vernon probably listed the President as head of family.*

My second sample case was Thomas Jefferson, who, as Secretary of State, mailed the first census act to each Governor toward the end of March 1790. During the census period, Jefferson was almost as peripatetic as his President, but he spent more of this period in Philadelphia than anywhere else. He, like many others, was following the seat of Government around, which had no settled place of residence for itself, and was migrating from New York to the banks of the Potomac, with a long pause in Benjamin Franklin's home town.

Jefferson's name appears twice in the first census—once in Virginia at Montecello together with the appropriate tallies—and again on a schedule for Philadelphia, and in his own handwriting. There was no tally next to the name, so, presumably no double counting. According to one account, **Jefferson and Edmund Randolph, the first Attorney General, saw a census schedule posted on a tavern** wall for the inspection of all concerned, as the law required, and signed their names in case they were not listed back home.[2] It seems unlikely that either man was worried about omission, but Jefferson may have thought he should be listed "where he or she shall be" at census time. Philadelphia was his favorite city and he took a one-year lease for a Market Street house, on which he invested a considerable sum for improvements.

I added to my sample a dozen Members of Congress who were attended its sessions during part of the census period. Most of these were listed in their home States. The

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* The original Virginia returns were lost in the 1812 burning of the Capitol. The information was later reassembled from property lists and partial state census returns for years just preceding 1790.

few not found may have been missed, or numbered but not listed by name. Congressman James Madison, if counted in Virginia, would have been a tally next to the name of his father, head of family, master of plantation, and leading citizen of Orange County.

The origin of the residence, or de jure, concept of enumeration is ancient. To treat the topic exhaustively, we should have to begin with the census symbols on about 30,000 Babylonian clay tablets created 5 to 6 thousand years ago. From ancient to modern times, however, the main purposes of census taking remained constant: to assess military strength, measure wealth, and collect taxes. The quest for knowledge was a latecomer.

For raising armies and taxes, counting people where they usually lived was common sense. In some instances, people were required to gather in central places, or travel to their birthplaces to be numbered. In American census history, the mixture of de jure and de facto procedures we now follow has evolved from practical considerations, including the time allowed for canvassing, as well as social and political influences. Here, we will focus on the practical side, mainly through the laws enacted and instructions issued for the early censuses.

The delegates who gathered in Convention in 1787 knew what a census was, as well as the failure of Congress to carry one out to apportion the costs of war, as required by the Articles of Confederation. They knew what a census was because 38 censuses were attempted during the colonial period, some good and others poor. More than half of these were taken in New York, Connecticut, Rhode Island, and Massachusetts. A few of these were quite thorough and well regarded. A census of Rhode Island in 1776 so closely resembles the 1790 census in style that it may have served as a model.

At the Philadelphia Convention, the earliest version of the census clause simply called for proportioning the legislature to "the quotas of contribution or the number of free inhabitants, as one or the other rule may seem best in different cases."[3] This vague formula was soon caught up in protracted controversy over proportional representation—the one issue that deadlocked progress for several weeks. Whether the census would measure wealth, or inhabitants, or both, hung in the balance while delegates compromised their differences over representing slaves, small states vs. large, the influence of new western states, one vs. two branches for the legislature, and sectional rivalries over trade, commerce, and taxes.

A second version of the census clause is noted here only in part: representatives would be in proportion to "the whole number of white and other free citizens and inhabitants . . ."[4] This was the only time, from May's beginning to September's end, that citizens were distinguished from inhabitants in reference to the census. In all subsequent discussions of the census and proportional representation, the term "citizen" was never used.

The third version of the census clause was adopted by mid-July, after much debate about including all or none of the slaves in the basis for representation. The three-fifth's rule they adopted came from the Articles of Confederation, and was accepted as pure compromise to move beyond total impasse. Excluding Indians not taxed was not even debated.

But the July version of a census, approved on a 6 to 4 vote, had a catch. It required a census of wealth as well as inhabitants. Had the matter ended at that point, perhaps our 20 censuses would have more closely resembled the work of the tax collectors of Rome.

The notion of basing representation on wealth was favored by some southern delegates; wealth meant property, and property meant slaves, the essential ingredient in their prosperity. To other delegates, including wealth was repugnant for that very reason. Still others thought wealth and population were in close correspondence, or soon would be. Several delegates noted there was no practical way to measure wealth anyway. The issue was a slippery slope for all, and after two day's debate, the delegates climbed to safer ground and deleted the wealth requirement on a vote of 9 to 0.

In modern studies of census methods and results, statisticians sometimes find it useful to view the census as an estimate among estimates. Delegate Roger Sherman of Connecticut saw a difference:

> "The number of people alone is the best rule for measuring wealth as well as representation . . . if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers."[5]

In rejecting wealth as a rule for apportionment, the delegates abandoned an opportunity to perpetuate a landed aristocracy. In other contexts, they took similar steps to yield existing political power to future uncertainties. They were generally well-to-do—Alexander Hamilton called them the "rich and well-born"—and they were designing the rules. At times they feasted on good will, cogent arguments, and even vision. On occasion, they admitted candidly that if they failed to form a stronger union, the work would be done by a foreign sword. As much as they valued property, the best of them valued more greatly the freedom to acquire it.

Even as the delegates met in Philadelphia, owning property and acquiring freedom were linked together in the minds of the less privileged. To be secure in one's home had already found expression in bill-of-rights amendments to some State constitutions. Emigrants from Europe could

own property even if they chose not to become citizens. Colonial landholders often received 50 acres of land for each indentured white servant whose passage to America they paid for. When their servitude ended, many of these people received their freedom and a few acres of land in one breath. Although the delegates guaranteed the evil of importing slaves for 20 years, there were strong objections to this action, one protesting that it was inconsistent with the principles of the revolution and dishonorable to the American character. At the time, two States had abolished slavery and two more had prohibited importation of slaves, though the effects of these steps were more symbolic than real.

As for the census clause as finally written, once the major issues were settled, only two further points were debated briefly: when to take the first census and how often to repeat it. Politics were at work on both scores. The more rapidly growing States, which included large and small, preferred action sooner than later, and frequent alterations in representation thereafter. Thus, taking the first census 6 years after the Constitution was completed was rejected in favor of 3 years, and census intervals of 20 years were rejected in favor of 10 years.[6]

In four months, no one had spoken a word about counting people at their usual place of abode.

Less than three years later, the first census act went through Congress to the President's desk in five weeks and without significant controversy. Committee discussions are not available, but a House con....ittee drafted a bill within one week. Floor discussions reveal only a few points of contention, principally James Madison's proposal to list people by their occupations, which was approved by the House and rejected by the Senate. The House bill provided six months for the actual enumeration, though one Member observed that the more time

allowed, the less accurate the results would be. The Senate extended this period to nine months. No one on the floor spoke a word about place of abode.[7]

The census law contained about 1600 words and not a single definition. It covered, concisely, what the U.S. marshals and their assistants must do, the times allowed, boundaries to be followed, differential piece rates for urban and rural workers, public inspection of completed schedules, stiff penalties for neglect of duty, and the three residence rules cited earlier.

In 1790, there were at least a few Americans abroad, including Thomas Jefferson until his summer voyage home from France. There were people in institutions, people with two homes, riverboat captains with no settled place of residence, militia on post duty in the territories outside of any State, and college students attending, for example, Yale, Harvard, Princeton, and William and Mary. Eventually, all of these classes were attended to, as we shall see. But, in 1790, the men who wrote the first census act committed to final form as few words as they thought needed, as the delegates did who composed Article I, Section 2, of the Constitution.

A clue to this brevity of treatment is found in the intellectual continuity of authorship. Almost one-third of the 55 Convention delegates were elected to the first Congress, seven to the House, and nine to the Senate. Four of these 16 were among the dozen delegates who made the most solid contributions to the formation of the Constitution, and were active in debating proportional representation and the periodic census. Coincidentally or not, the same four men were, two each, on the House and Senate committees that wrote the census act in final form. They were: Roger Sherman, Oliver Ellsworth, James Madison and William Johnson. Their years of service in the Continental

Congress (1774-1789) were 10, 7, 5, and 3 respectively. Three were jurists. Sherman and Johnson were Connecticut State Judges. Ellsworth became Chief Justice of the U.S. Supreme Court in 1796. Madison is "father of the Constitution" in nearly every school text.

Numbering the inhabitants by place of abode, with any degree of accuracy, depended more on the marshals and assistants to whom the work was given than the authors who drew up the assignment. When the work was done, 3.9 million people were numbered next to the names of 558,000 heads of families. Many names were so common, and were used with so many variations in spelling, that the number of distinctly different names was only 27,000. My not-so-common name appears 277 times under 21 spellings.

The way in which people were listed and numbered in 1790 has almost an egalitarian cast, which would have pleased Jefferson if he studied the returns that came to the President during 1791. Virtually all of the names represented owners of property. But each got a single line, from the landed gentry to the humble farmer or shoemaker. Five columns were prescribed for numbering the people. The distinctions were few. First, they were free or slave. If free, they were white or "all other free persons"—a provision for the 60,000 free blacks included in the census. If white, they were male or female, if male, they were under 16 years of age or 16 and over.

All of these persons were ciphers with equal weights of one in the final aggregates. Only the family name was listed; by law, this was the master, mistress, steward, overseer, or other principal person therein. Thus, the wife of a plantation owner was a tally with no identity. A few lines below, an entry might appear for "H. Jones, free Negro." The aggregate returns showed that for 7 of the 16 States enumerated, the number of free blacks was higher than the

number of slaves. Of the 3.9 inhabitants numbered, slaves accounted for 694,000, or 17.8 percent. Their total was reduced by two-fifths only when additional tables were compiled for congressional apportionment. In arithmetic terms, the census act was an instruction for marshals to number all the inhabitants, whereas the census clause in the Constitution was an instruction for Congress to alter its number of Representatives.

The 1790 law was re-inacted with only slight variations for the following two censuses. The 1800 act provided for regulations and instructions, but none has survived, if any were written.

The 1810 act stipulated that the enumeration was to be made "by actual inquiry at every dwelling house . . . and not otherwise." There are two possible reasons for this caution. Some enumerators may have delegated some of their work to others, more or less under the table. In 1850, an instruction would say the work "cannot be performed by deputy or proxy." Second, enumerators may have been tempted in certain areas to copy from administrative records. Samuel Bradford of Boston completed his work in 1790 in 17 working days, numbering 1,000 people per day. At the rate of 7 persons per dwelling unit at that time, working 9 hours continuously every day, he listed and numbered a unit every 4 minutes.[8] Sounds to me like a transcription from the city's property rolls.

Preparations for the 1800 census were probably negligible, since the Department of State at the time was largely in the hands of its clerks, and they were not conscientious about administrative matters. Secretary of State John Marshall was in the job only a few months. Similar conditions prevailed in 1810. Throughout both periods, the department's foreign affairs function received most of the attention, to the relative neglect of "home office" functions. The 1810 census was taken under the official

authority of Secretary of State Robert Smith, who had no competence for it, Chief Clerk John Graham who had the competence but not the time, and senior clerk John Colvin, who had the time but not the inclination to do anything well.

This state of affairs improved dramatically for the 1820 census, taken while John Quincy Adams was Secretary of State. Adams took all of his functions seriously and attended thoroughly to details. In the spring of 1820, Adams asked around for the 1810 census instructions and discovered "there was not a line to be found upon the subject on the records of the office." After finding them in a newspaper, he prepared his own, believing that "each census ought to be an improvement upon that last preceding it."[9] His instructions were three times longer than the census act, and he mailed these to the marshals along with numerous printed forms in sufficient quantities for all enumerators. One enclosure specifically stated all of the questions to be asked, in proper sequence. The last two questions dealt with place of residence. First, was there any person without a settled place of residence; if so, give the name. Then, was there any person belonging to the family occasionally absent from it; if so, provide the age, race, sex, and condition. The instructions noted that "all of the questions refer to the day when the enumeration is to commence." Enumerators were to include "even those who may be deceased at the time when they take the account" and to exclude "infants born after" census day.[10]

Adams should be credited with starting an important tradition: methodical review of the previous census as part of careful preparation for the next one. In terms of obtaining accurate census results, his signal contribution was to have printed for the enumerators the exact wording and sequence of questions to be asked.

The 1830 and 1840 censuses were taken under similar laws and instructions as before. In advance of the 1850 census, deficiencies in procedures and errors in results received much more attention, most notably from the American Statistical Association in an 1843 report to Congress. For the 1850 census, responsibility was assigned to the Department of Interior, and the statute and subsequent instructions reflected substantial concern with accuracy. For the first time, enumerators got a package of definitions and residence rules. These decision rules are of special interest because they preceded quite a few of today's interests by 136 years.

Three operational definitions were provided. (Paraphrased)

1. *Place of Abode*—The house or usual lodging place of a person, including anyone who is temporarily absent on a journey or for other purposes, without taking up a residence elsewhere and with the intention of returning to this place.
2. *Dwelling House*—A separate inhabited tenement containing one or more families under one roof. Tenements with dividing walls of brick or wood, and separate entrances, are separate houses.
3. *Family*—A person living separately in a house or part of a house, or several persons living together in a house or part of a house, upon one common means of support. This definition included "a widow living alone and separately providing for herself," as well as "200 individuals living together and provided for by a common head," such as the residents of a jail, hotel, hospital, asylum, garrison, or other similar institution.

The first residence rule was for college students:

"Students in colleges, academies, or schools, when absent from the families to which they belong, are to

be enumerated only as members of the families in which they usually boarded and lodged on the 1st day of June." Twenty years later, this rule was stated inversely: "children and youth absent for purposes of education on the 1st of June, and having their home in a family where the school or college is situated, will be enumerated at the latter place."

The 1850 rules for crews of vessels were intended to provide uniform rules for the whole United States, but they were a struggle. Crews of vessels temporarily in port were not to be enumerated as part of the population of that place if they (a) were boarding for a few days at a sailor's lodging place, or (b) the vessel was their only habitation, or (c) they belong to other places.

The sailors and hands of a revenue cutter which belonged to a particular port, however, were to be enumerated as of such port. This rule applied to lakes, rivers, and canals, as well as seaports. Anyone left over who actually lived on a vessel was to be counted where the vessel was owned, licensed, or registered.

For crews of vessels at sea, enumerators were to visit the appropriate offices in every seaport for lists of all persons on a voyage at sea, and "register all citizens of the United States who have not been registered as belonging to some family."[11]

For the 1880 census, rules were added for transients, soldiers, and Indians. Enumerators were to search out the floating population, with the aid of property owners and police if needed, and to list transients by proxy report when all else failed. Transients were "individuals living out of families" occupying lofts in public buildings, stores, and warehouses, living solitary in cabins, huts, or tents, or sleeping on river boats and barges, all with no other usual place of abode.

The rule for soldiers took care of the Army but said nothing of naval personnel:

"All soldiers of the U.S. Army, and civilian employees, and other residents at posts or on military reservations will be enumerated in the district in which they reside, equally with other elements of the population."

Indians not taxed and not in "tribal relations" were to be included in the enumeration "as part of the ordinary population of the country for the Constitutional purpose of the apportionment of Representatives" if they were "residing in white families, engaged as servants or laborers, or living in huts or wigwams on the outskirts of towns or settlements."

We conclude our review of early place of residence rules with the 1880 instruction for resolving doubtful cases:

"The census law furnishes no definition of the phrase, "usual place of abode;" and it is difficult, under the American system of a protracted enumeration, to afford administrative directions which will wholly obviate the danger that some persons will be reported in two places and others not reported at all. Much must be left to the judgment of the enumerator, who can, if he will take the pains, satisfy himself in the great majority of instances as to the propriety of including or not including doubtful cases in his enumeration of any given family."[12]

What we have surmised all along becomes obvious in this instruction. Congress created a census act each 10 years on a broad canvass, specified only that all inhabitants were to be enumerated by a few basic residence rules, and left the details of where to count them to executive discretion. For the first century, as far as we know, the discretionary rules we have noted were not the subject of litigation.

As noted earlier, the Constitutional Convention did not debate the scope of the term "inhabitants." For census purposes, this all-inclusive term apparently held wide acceptance. The phrase "citizens and inhabitants" was on the floor briefly, and only the more inclusive term "inhabitants" was used in all subsequent discussion of the census. Only untaxed Indians would be omitted entirely. The first census act used the term "inhabitants" and the phrase "all persons" interchangeably. The phrase "usual place of residence" meant no more than the phrase "usual place of abode," but the Convention delegates drew a distinction between "resident" and "inhabitant" when they fixed the qualifications for Members of the House of Representatives. The provision appears just before the census provision in Article I, Section 2, and specifies that no person shall be a Representative who has not been a citizen for seven years, and must "when elected, be an inhabitant of that State in which he shall be chosen." At the time these restrictions were adopted, the last phrase specified "resident of that State." This was promptly amended to substitute the term "inhabitant" as less subject to misinterpretation, on the grounds that the residence qualification was controversial in several States owing to disputes over cases where a person was a resident but not present continuously. The term "inhabitant" was preferred in order to include citizens eligible for public service who were occasionally absent from home but plainly inhabitants of their home State.

The census number of inhabitants was intended to include noncitizens, foreigners as well as slaves. Evidence on this point is scant, but reasonably clear from the nature of relevant congressional debates as well as actual census practice in aggregating the returns.

The first naturalization act under the Constitutional provision for one, was enacted as a companion in time

with the first census act. On one February day in 1790, both bills were discussed on the House floor in close sequence, with a few of the same Members as participants. The main debate on naturalization was whether the rules for becoming a U.S. citizen should be generous or restrictive. At that stage in our history, generosity won out; more specifically, the economics of encouraging population increase won out.

Roger Sherman favored this development, and noted with satisfaction that the naturalization bill as drafted provided a rule for "all free white persons, which includes emigrants, and even those who are likely to become chargeable"—meaning, apparently, the prospect of some misfits from abroad who would commit crimes and end up in jail. Another Member remarked that foreigners would have to pay taxes from the time they settled among us, and taxation and representation ought to go hand in hand. Thus, foreigners should acquire citizenship readily in order to vote in elections. The final bill required two years residence in the U.S., one of those within the State of application for citizenship, oath of allegiance, and proof of good character. The opening line in the statute defined the universe affected, as, "any alien, being a free white person . . ."[13]

In taking up the census bill, no Member expressed a doubt whether these aliens should be numbered in the census. No distinction has been found in the actual conduct of the early censuses to suggest they were not counted or not supposed to be counted. For the 1820 census, a column was prescribed for counting the "foreigners not naturalized." The instructions were clear that this subtotal was part of the grand total. The census report given to Congress shows clearly that noncitizens were included in both the total population and the apportionment population.

The first apportionment bill, introduced in November 1791, took five months to get through Congress. Since there were several ways to calculate the number of Representatives to which each State would be entitled, for example, admitting or rejecting fractions, many tables were constructed and much controversy ensued. Political arithmetic and horse-trading went on for weeks as the proponents of a given scheme in one State sought support in other States, in search of a majority. The bill finally enacted in March 1792 was the occasion for the first presidential veto by George Washington, on the strength of a detail analysis of the bill by Jefferson to which Attorney General Randolph agreed. The bill allotted eight States a number in excess of the constitutional ratio. Twenty-eight House Members voted to override the veto, but 33 voted against. An acceptable bill was then enacted within a week.[14] Who was counted in the census was not an issue.

By the end of the 19th century, the historical basis for enumerating the whole number of inhabitants by practical rules of residence was well established. The residence rules became, in general terms, a continuing tradition. Moreover, the rules were elaborated through the exercise of discretion to explain the meaning of the statutes, and to obtain more uniform procedures and results, leaving doubtful situations, sensibly, to individual judgment.

We have implied that these developments also form the legal basis for who to count and where to count them. Some of the discussions to support this connection admittedly represent "sanction sub silentio." Or, in colloquial terms, silence gives consent. In truth, silence often did give consent. Many provisions of the Constitution in final form were silent, brief, or oblique as reflections of the sharp edges of Convention debate. The framers employed such

tactics in the census clause in reference to slaves as "three-fifths of all other Persons." This attempted subtlety was to encourage ratification.

Most importantly, the half-silent who and where of early census history have found voice throughout this century through legislative debate and judicial opinion. Congress has historically accepted the meaning of "total population," and "the whole number of persons" attributed here to the framers of the Constitution, and expressed by the Supreme Court in 1964 in *Wesberry v. Sanders*. The most exhaustive congressional debates on the topic occurred from 1929-1931, during discussions on the 1929 census act, which provided for automatic reapportionment; and subsequent proposals to amend the Constitution to exclude aliens from census apportionment totals. On rules of residence, including different rules in different censuses regarding military personnel or other Americans abroad, the annotated census code cites relevant case law, most of which arose during the last three decennial censuses. In general, the cases show that the courts have limited their review to the proper exercise of discretion or the propriety of their jurisdiction on constitutional grounds. Practical considerations, especially those of time and money, have invariably been given due weight.

A key ingredient in this pattern is that except on constitutional issues, the Constitution gives exclusive jurisdiction over the census to the Congress, which has delegated the details to the Census Bureau. This sturdy tradition has endured, not through silence or subtlety, but through controversy and litigation.

Thus far, the census takers have adhered to sound practice well grounded in our early history, and changed the rules for good reasons. If this past is prologue, they will do all right the next time.

November 1986

NOTES

[1] Census Act of March 1, 1790, 1st Congress, 2nd Session, Statutes, 101.

[2] *Census '80: Continuing the Factfinder Tradition,* Bureau of the Census, GPO, Washington, D.C., 1980, p. 11.

[3] *Formation of the Union of the American States,* 69th Congress, 1st Session, House Document No. 398, GPO, Washington, D.C., p. 116.

[4] Ibid, p. 202.

[5] Ibid, p. 356.

[6] Ibid, p. 367.

[7] *Annals of Congress,* 1st Congress, 2nd Session, Vols. 1 & 2, pp. 980-1170, passim.

[8] *A Century of Population Growth,* Bureau of the Census, GPO, Washington, D.C., 1909, p. 46.

[9] *The Jeffersonians: A Study in Administrative History, 1801-1829,* Leonard D. White, The MacMillan Co., New York, 1951, p. 204.

[10] These and subsequent references to ennumerator instructions are taken from Carrol D. Wright, *The History and Growth of the United States Census,* U.S. Senate Document No. 194, 56th Congress, 2nd Session, 1900, pp. 133-171.

[11] Ibid, pp. 150-151.

[12] Ibid, pp. 168-171.

[13] *Annals of Congress,* 1st Congress, 2nd Session, Vols. 1 & 2, pp. 1165-1463, passim.

[14] See *George Washington,* Vol. 6, Douglas S. Freeman, Charles Scribner's Sons, New York, 1954, pp. 343-348; and *Congressional Apportionment,* Lawrence F. Schmeckebier, Brookings Institution, Washington, D.C., 1941, pp. 226-233.

UNITED STATES DEPARTMENT OF COMMERCE
WASHINGTON, D.C. 20230

BUREAU OF THE CENSUS

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS: WHO TO COUNT AND WHERE TO COUNT THEM

DR. JOHN G. KEANE
DIRECTOR, BUREAU OF THE CENSUS

UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CENSUS AND POPULATION

APRIL 18, 1988
ROCKVILLE, MD.

INTRODUCTION

Mr. Chairman, I am here today to report to you on the enumeration and residence rules we plan to use to conduct the 1990 census. By *enumeration* rules, I mean who we will count. By *residence* rules, I mean where we will count them.

The Census Act of 1790 covering the first decennial census established the concept of "usual residence" as the guiding principle. This concept still governs the establishment of enumeration and residence rules. If the usual residence is in the United States, we count the person. If it is outside the United States, we do not. To determine where to count a person, we define "usual residence" as where a person lives and sleeps most of the time time. Usual residence is not necessarily the same as legal residence, voting residence, or the place where a person is found on Census Day.

As in past censuses, we identified specific population groups and living situations for which we must establish enumeration and residence rules. To determine the rules, we examined past practices and sought advice from outside experts. In December 1986, the Council of Professional Associations on Federal Statistjcs (COPAFS) arranged a conference to discuss decennial census enumeration and residence rules. Forty-five experts on various population groups for which residence may not be clearcut attended this meeting. It was an important milestone in the development of our plans.

We also hired a private consulting firm to participate in the conference and to develop recommendations based in part on the discussions at the conference. This additionally strengthened our planning.

First, I will discuss enumeration rules, and then I will discuss residence rules.

ENUMERATION RULES

The enumeration rules for the 1990 census are consistent with the practices of past censuses. We will attempt to count all persons residence in the United States on Census Day, April 1, 1990. This includes American citizens, aliens (documented and undocumented), and foreign diplomatic personnel who do not live on the premises of an embassy or legation. Americans who are temporarily abroad will be counted at their usual residences. (Foreign diplomats residing on the premises of an embassy or legation will not be counted because their residences are considered to be on foreign soil. Foreign travelers in the United States for a short time, such as tourists or business persons, will not be counted because they have not established residence.)

Based on the concept of usual residence, we plan to count undocumented aliens in the 1990 census. Some people argue that undocumented aliens should be excluded from the apportionment counts. Legal and constitutional issues aside, there is no acceptable method to do this. We believe the methods that have been proposed so far—including direct enumeration and estimation—would be likely to introduce significant errors that could affect the allocation of one or more congressional seats.

One method that has been proposed is to ask respondents whether they are legal residents of the United States. Then we would count only legal residents for apportionment purposes and all residents for other purposes. This method has serious flaws and could seriously jeopardize the accuracy of the census:

- A census of only legal residents cannot be done as accurately as a census of all residents. People who are undocumented aliens may either avoid the census altogether or deliberately misreport themselves as legal residents in the census.

- The 1990 census counts for some states and substate areas may be lower than expected. Legal residents may be confused about why the Government is asking whether a person is here legally. Legal residents, therefore, may misunderstand or mistrust the census and fail to respond.
- The census would be less accurate because we could not check on whether all legal residents had been included. We would not know whether a specific housing unit contained legal residents who had failed to answer the census or undocumented residents who avoided the census.
- Undocumented aliens are unlikely to report to the Census Bureau, a Government authority, that they are in the country illegally. If they are not correctly identified, we would have no way to exclude undocumented aliens from the census counts for apportionment but include them for other purposes.
- If large proportions of undocumented aliens avoid the census, the 1990 census counts will be lower than states and substate areas expect. We will not know at the time of apportionment whether this results from undercount of legal residents or from undocumented aliens who avoided the census. Those who avoid the census would not be included in any counts, even for purposes other than apportionment.
- Finally, many aliens do not *know* precisely what their legal status is because the determination of legal status can be very complicated. In many cases it involves administrative and judicial proceedings and that is not something we can provide in the census.

Another proposed method is to subtract an estimate of undocumented aliens from the census count. We would

have to get the number of legal aliens in the country from the Immigration and Naturalization Service (INS). Then we would compare that number with the number of aliens, both legal and undocumented, reported in the census. The difference would be subtracted from the census counts to get an estimate of the number of legal residents.

This method is also seriously flawed. The INS does not have counts of the number of legal aliens in the country now or on Census Day. They also do not know where most legal aliens reside. Such information would be vital to implement this method. Even if the INS could obtain this information in time for the census, the apportionment counts would be estimates. If Congress mandated that we exclude undocumented aliens from the apportionment counts, it would be the first time in history that Congress will have directed that the census be designed to use statistical estimates to apportion the House of Representatives. If the INS estimates of legal aliens are not complete and accurate, our estimates of undocumented aliens could be too high or too low. Thus, we could subtract too many or not enough people from the census. The numbers for apportionment might still include an unknown number of undocumented aliens, or they might not include all legal residents. Finally, apportionment could be challenged on the basis of different procedures for estimating the number of legal residents.

According to the usual residence concept, the 1990 census counts for apportionment would not include military personnel or their dependents living outside the United States. For the 1990 census, we could obtain counts of military personnel stationed overseas by using Department of Defense (DOD) administrative records. The DOD may have home state of record and state of last U.S. residence. We have some concern that the state information reported

by overseas military personnel as home of record in the United States, if any, may not be a "residence," but may be chosen for other reasons. The last U.S. residence may not be a state to which they expect to return. In spite of these quality concerns, we could allocate this population to states for apportionment purposes, using administrative records, should we be directed to do so.

It might appear that a census of overseas military personnel would solve these problems with the quality of home state information, but that may not be the case. The home state information collected in a census may be no better than that in the administrative records. Some military personnel do not maintain a usual residence in the United States while they are stationed overseas. Other military personnel may report the home of record accurately in both the DOD administrative records and in a census. Those who report a home of record in the administrative records that is not in fact a "residence" are likely to report the same home state in a census, particularly if the census is administered by military personnel.

An overseas military census would be a large, complicated, and expensive new operation. The home state information needed for apportionment may not be much different from that we could obtain, more efficiently, through the use of DOD administrative records.

For military dependents, the DOD administrative records do not contain accurate residence information. In many cases, it may not be possible to determine whether the dependents were living in the United States and therefore, already included in the census, or are with the military person living overseas.

RESIDENCE RULES

Persons Away from Their Usual Residence

Now, I will turn to residence rules. We plan to count persons away from their usual residences on Census Day at their usual residences. This would include business travelers and vacationers, for example. One way we do this is to leave questionnaires at each room in hotels, motels, and camp-grounds. Persons who will not be enumerated by a household member at their usual residence can fill out a questionnaire and include the address of their usual residence. We will count them at that address.

Persons with Multiple Residences or no Residence

We will count persons with multiple residences, including members of Congress, at what they consider to be their usual residence; we can only count persons at one residence. We will count persons with no usual residence, such as the homeless, where they are found living or staying at the time of the census.

College and Boarding School Students

We plan to count college students living away from their parental home at their college or university residence. Prior to 1950, we counted such persons at their parental home. We found that many parents failed to include their children away at college, leading to an undercount of this population. Therefore, for the 1950 census we switched to the practice we currently use. In addition, since college students eat, sleep, and work most of the year in the area of the college, it is in keeping with the "usual residence" concept to count them at their college residence. Boarding school students below the college level will be counted at

their parental home. Because of their age and dependency on their parents, their parents are likely to consider them part of the parental home.

Movers and Migrant Workers

We will count persons who move on or near Census Day at the place they consider to be their usual residence on Census Day. We will count migrant workers either at the camp where we contact them or at their usual residence, if they report one.

Care or Custody Facilities

We will count persons residing in a long-term care or custody facility—such as a mental institution or prison—as residents of the institution. Persons in a short-term care or custody facility—such as a general hospital—will be counted at their usual residence, if they have one, or at the facility if they do not.

U.S.-Based Armed Forces and Marltime Crews

We will count land-based members of the Armed Forces residing in the United States at their usual residence, whether it is on base or off base. We will count crews of U.S. Navy ships and crews of U.S. Coast Guard vessels at their usual residence, whether it is on board ship or on shore. The exception to this is crews of vessels deployed to the 6th or 7th Fleets, which we will consider part of the overseas population. We will count crews of maritime vessels flying the American flag at their usual residence, whether on board ship or on shore.

FINAL THOUGHT

At the hearing last week on the 1990 census questionnaires, I emphasized that we are on a tight time schedule with regard to getting the questionnaire printed and must finalize our plans soon. Without questionnaires we cannot conduct the census. We must begin preparing our final package for OMB clearance on May 2. What is true for census content and sample design, is true also for enumeration and residence rules. We cannot finalize the questionnaires until enumeration and residence rules are final.

Mr. Chairman, that concludes my testimony. We established these enumeration and residence rules based on consistency with historic practices and on our belief that they will contribute to our goal of having the most accurate census possible. I will be happy to answer any questions you may have.

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

[08 JUN 1988]

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of this Department on H.R. 4720, a bill to amend title 13, United States Code, to require the Secretary of Commerce to include all Federal civilian and military personnel stationed overseas, and their dependents living overseas, in the census counts for apportionment.

The bill would require that "any member of any of the uniformed services . . ." and "any civilian employee of the United States who is absent from the United States as a result of having been assigned to a post of duty outside the United States, and any dependent of any such member who has left the United States in order to reside at or near such post" be included in the apportionment counts. It specifies that the place of residence for these persons "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer."

The Department opposes the enactment of H.R. 4720. The Administration believes that the concept of "usual residence," where a person lives and sleeps most of the time, is the appropriate basis for deciding who should be counted in the census. Because no administrative records

exist that include the necessary residence information or information about dependents, H.R. 4720 would require a complete census of all overseas Federal employees.

The Office of Personnel Management reports that 11 cabinet departments and 17 other Federal agencies had citizen employees in foreign countries as of January 1988. These employees were stationed in about 160 countries. Adding such a large and costly operation to the census this late in the decade gives the Census Bureau little time to plan, coordinate, and budget for this effort.

The Census Bureau and the Department of Defense (DOD) have agreed to conduct a census of overseas DOD employees and their dependents. The data collected under this agreement are for statistical purposes, not apportionment. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Bureau of the Census. There is no comparable agreement with any of the 27 other agencies that have employees stationed overseas.

The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, Federal civilian employees, or their dependents, when such individuals live outside the United States.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the-Administration's program.

Sincerely,

/s/ ROBERT H. BRUMLEY
Robert H. Brumley
General Counsel

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

[JUN 23, 1988]

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of Commerce on H.R. 3814 and H.R. 4234. The bills would add new provisions to 13 U.S.C. 141 to require the Secretary of Commerce to ensure that tabulations of population used for apportionment of Representatives in Congress: (1) include members of the armed forces and their dependents living overseas; and (2) exclude aliens not lawfully admitted for permanent residence. In addition H.R. 3814 would require the Secretary to include civilian employees of the Department of Defense and their dependents living overseas.

The Census Bureau bases its decision about who should be counted in the census on the concept of usual residence. Usual residence, a principle that was established by the Census Act of 1790, is defined as where a person lives and sleeps most of the time. Usual residence is not necessarily the same as legal residence, voting residence, or the place where a person is found on Census Day. If the usual residence at the time of the census is in the United States, we count the person. If it is outside the United States, we do not. According to the usual residence concept, the 1990 census counts for apportionment will not include military

personnel or their dependents, living outside the United States, and will include all persons usually resident in the United States on Census Day without regard to their legal status.

The most recent legal review of our practice of including all aliens in the census counts without regard to their legal status occurred in connection with the 1980 census. Although the case was decided on procedural grounds, the U.S. District Court observed in *Federation for American Immigration Reform* v. *Klutznick*: "It [the Constitution] requires the counting of the 'whole number of persons' for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons'." D.C.D.C. (1980) 486 F. Supp. 564.

The Department of Justice advises that it would be unconstitutional to exclude aliens who claim the United States as their residence and that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, the Department of Defense (DOD) civilian employees or their dependents, when such individuals live outside the United States.

The Census Bureau and the DOD have agreed to conduct a census of overseas DOD employees and their dependents. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Census Bureau. The data collected under this agreement are for statistical purposes, not apportionment.

We have not found an accurate procedure to exclude illegal aliens from the apportionment counts. We believe the proposals we have examined so far—including direct enumeration and estimation—would be likely to intro-

duce significant errors that could affect the allocation of one or more Congressional seats. We cannot forecast with certainly how many seats and which states might be affected.

One method that has been proposed is to ask repondents whether they are legal residents of the United States and count only the legal residents for apportionment purposes and all residents for other purposes. This method has flaws:

- A census of only legal residents cannot be done as accurately as a census of all residents. People who are illegal aliens may either avoid the census altogether or deliberately misreport themselves as legal residents in the census.
- The 1990 census counts for some cities and states may be lower than expected. Legal residents may be confused about why the Government is asking whether a person is here legally. Legal residents, therefore, may misunderstand or mistrust the census and fail to respond.
- The census would be less accurate because the Census Bureau could not check on whether all legal residents had been included. The Census Bureau would not know whether a specific housing unit contained legal residents who had failed to answer the census or illegal residents who avoided the census.
- Illegal aliens are unlikely to report to the Census Bureau, a Government authority, that they are in the country illegally. If they are not correctly identified, the Census Bureau would have no way to exclude illegal aliens from the census counts for apportionment but include them for other purposes.
- If large proportions of illegal aliens avoid the census, the 1990 census counts will be lower than cities

and states expect. The Census Bureau will not know at the time of apportionment whether this results from undercount of legal residents or from illegal aliens who avoided the census. Those who avoid the census would not be included in any counts, even for purposes other than apportionment.

Another proposed method is to subtract illegal aliens from the census count. The Census Bureau would have to get the number of legal aliens in the country from the Immigration and Naturalization Service (INS) and compare that number with the number of aliens, both legal and illegal, reported in the census. The difference would be subtracted from the census counts to get an estimate of the number of legal residents. This method s also flawed:

- The INS does not have counts of the number of legal aliens in the country now or on Census Day. They also do not know *where* most legal aliens reside. This information would be vital to implement this method.
- Even if INS could obtain this information in time for the census, the apportionment "counts" would be estimates. If the Congress mandated that we exclude illegal aliens from the apportionment counts, it would be the first time in the history of the census that Congress will have directed that the census be designed to use statistical estimates to apportion the House of Representatives.
- If the INS estimates of legal aliens are not complete and accurate, the Census Bureau's estimates of illegal aliens could be too high or too low. Thus, the Census Bureau could subtract too many or not enough people from the census. The numbers for apportionment might still include an unknown

number of illegal aliens, or they might not include all legal residents.

- Apportionment could be challenged on the basis of different procedures for estimating the number of legal residents.

One of the ways the Census Bureau decides what to ask in the census is whether the subject is suitable for self-enumeration. This is important because only about 78 percent of the households in the country are likely to answer their questionnaires and return the forms by mail. The determination of legal status among types of aliens is not straightforward. Many aliens do not know precisely what their legal status is; it requires administrative and judicial review. Neither the Census Bureau nor its enumerators in the field have the legal qualifications to assist respondents in answering such a question.

H.R. 3814 and H.R. 4234 specify that only aliens who have been lawfully admitted as permanent residents should be included in apportionment counts. This category of aliens may not be easily identifiable in either of the proposed methods. Other aliens, such as refugees and students, may be confused about their legal status and misreport themselves. Although INS records can give us numbers of persons admitted to the country as permanent residents, they do not show how many of those persons have subsequently left the country nor do they include current addresses for those who have stayed. This information is crucial to using INS records to estimate the number of aliens to be excluded.

A special group that would be excluded from apportionment counts if these bills were enacted are those aliens who receive amnesty under the Immigration Reform and Control Act of 1986. These persons will be granted temporary resident alien status initially. After 18 months, each person is eligible to apply for lawfully permanent residence.

The period during which these people will be applying for permanent resident status is likely to be from late 1989 until early 1991. Even those who will have applied before Census Day are not likely to have completed the application process. They therefore would not be included in the apportionment counts under the provisions of H.R. 3814 or H.R. 4234.

Another groups that would be excluded from the apportionment counts if these bills were enacted are aliens here under the "extended voluntary departure" or "temporary safe haven" categories. Many Polish nationals are in the United States with this indefinite status, neither legal nor illegal. Congress is considering extending this status to certain Central American aliens in this country.

For these reasons, the Administration opposes enactment of H.R. 3814 or H.R. 4234. We have been advised by the Office of Management and Budget that the submission of this report is consistent with the Administration's program.

Sincerely,

/s/ ROBERT H. BRUMLEY

Robert H. Brumley
General Counsel

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

JUN 23 1988

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of Commerce on H.R. 3815, "Relating to decennial census of population." This bill would add a new provision to 13 U.S.C. 141 to require the Secretary of Commerce to ensure that tabulations of population used for apportionment of Representatives in Congress include members of the armed forces, civilian employees of the Department of Defense (DOD), and dependents of such members or employees, living overseas.

The Census Bureau bases its decision about who should be counted in the census on the concept of usual residence. Usual residence, a principle that was established by the Census Act of 1790, is defined as where a person lives and sleeps most of the time. Usual residence is not necessarily the same as legal residence, voting residence, or the place where a person is found on Census Day. If the usual residence at the time of the census is in the United States, the Census Bureau counts the person. If it is outside the United States, the Census Bureau does not. According to the usual residence concept, the 1990 census counts for apportionment will not include military personnel, DOD

civilian employees, or their dependents living outside the United States.

The Census Burea and the DOD have agreed to conduct a census of overseas DOD employees and their dependents. The data collected under this agreement are for statistical purposes, not apportionment. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Bureau of the Census.

The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, DOD civilian employees, or their dependents, when such individuals live outside the United States.

For these reasons, the Administration opposes the enactment of H.R. 3815. We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

/s/ ROBERT H. BRUMLEY

Robert H. Brumley
General Counsel

FORM CD-183
(REV. 3-88)

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: ☒ The Secretary ☐ The Deputy Secretary Control No.:

Date:

DECISION MEMORANDUM

From: Michael R. Darby
Under Secretary for Economic Affairs

Prepared by: C.L. Kincannon/Census/US EA/763-5192

SUBJECT

1990 Census: Counting Military and Dependents Overseas for Apportionment Purposes

STATEMENT OF THE ISSUE

Up until now, the Census Bureau had not planned to include the military overseas in the 1990 census apportionment counts. To satisfy what appears to be a growing bipartisan concern of the Congress and to avoid unnecessary debate, the Census Bureau proposes to change its plans. The Department of Defense (DOD) believes strongly that its employees should not be excluded from apportionment counts because of temporary and involuntary residence overseas. Many, if not most, of these military overseas consider themselves to be usual residents of the United States, even though they are temporarily assigned overseas.

BACKGROUND

It is possible to include counts of military and civilian employees of the DOD. At its own expense, the DOD plans to conduct a census concurrently with the stateside census in April 1990. We are working closely with DOD on the form and procedures to be used. A significant reason for changing our plans is that the DOD has just recently stated that it is now feasible to provide the necessary counts of usual residents to us in time to meet the December 31, 1990 deadline for reporting apportionment counts to the President. If other Federal agencies had a means of providing to us timely and acceptable counts of overseas employees, we would include them as well.

The Commerce Department has the discretion, under Title 13, United States Code, to make this decision. The 1970 census was the only other census to include military overseas in the apportionment counts. At the time of that decision, the Department sought the opinion of the Justice Department on the legality of including military overseas.

Then Assistant Attorney General, William H. Rehnquist, in his legal opinion stated that the Constitutional provisions and statutes relating to the taking of the census and referred to in the Attorney General's opinion of 1949 have not been changed since that time. In the 1949 opinion the Attorney General wrote,

> "In summary, the Congress has vested in the Director of the Census, subject to the approval of the Secretary of Commerce, discretion to determine the manner in which inhabitants of the United States who are abroad on the enumeration date shall be enumerated. . . ."

RECOMMENDATION

I recommend that you approve the decision to include military and dependents overseas in the 1990 census for apportionment, provided that there is timely receipt of acceptable data from the Defense Department.

DECISION

Approve _____ X _____ Disapprove _____

discussed w/RM
7/31/89

	PREPARED BY	CLEARED BY	CLEARED BY
SURNAME & ORGANIZATION (Please type)	C.L. Kincannon L/Dir. Census	_ CH.C./EA	HAScarr
INITIALS AND DATE	*C.L.K* 7-22-89	*CH.C.* 7/27/89	*HAS* 7-28-89

PREPARED BY	CLEARED BY	CLEARED BY	CLEARED BY
SURNAME & ORGANIZATION (Please type)	Susanne Howard	Wendell Willkie	Counsellor
INITIALS AND DATE	*S.H.* 7/28/89	*W.W.* 7/31/89	*WB* 7/31/89

STATEMENT

OF THE

DEPUTY ASSISTANT SECRETARY OF DEFENSE

FOR

RESOURCE MANAGEMENT & SUPPORT

DAVID J. BERTEAU

HEARINGS BEFORE THE

SUBCOMMITTEE ON CENSUS AND POPULATION

OF THE HOUSE POST OFFICE AND

CIVIL SERVICE COMMITTEE

AUGUST 1, 1989

FOR OFFICIAL USE ONLY
UNTIL RELEASED BY THE
SUBCOMMITEE

I would like to thank the Subcommittee for inviting the Department of Defense to provide its comments on the censusing for apportionment purposes of DoD's military and civilian employees and their dependents abroad not only in the 1990 U.S. Census of Population but in all decennial censuses to come.

The Department has previously testified, and strongly reasserts, that its employees and their dependents overseas should be included in all decennial censuses which constitute the official statistics of the United States and which provide the population numbers used for apportionment purposes. Duty locations overseas are under the legal purview of the United States. The employees and their families pay taxes and receive their pay from the U.S. Government. It is in the service of their country that they are sent overseas. They have thus not chosen to live overseas in the usual sense of the term "choice." They consider themselves part of the U.S. population and are treated as such.

In the past, when the Congress has directed the Census Bureau to count the overseas military for apportionment purposes, the Bureau has requested information from DoD administrative files. In complying with those requests, we have been forced to use information on what is termed "home of record." We now know that this particular data element in our personnel records has a high error rate. "Home of record" may also be a place where the person has not lived for many years and, in some cases, may be a place where the employee has never lived.

After investigating all data elements on personnel records which indicate some form of state affiliation, the DoD decided that none of them meets a reasonable test of validity for apportionment purposes. That is one major reason why the Department supports the undertaking of an enumeration of the DoD overseas population in 1990,

concurrent with the decennial census in the 50 states, DoD, with the assistance of the Census Bureau, will gather data on employees' last U.S. state of residence for at least six consecutive months. Information on this last residence closely approximates the Census' concept of "usual residence" and can be used, the Department feels, for apportionment purposes. Should the Department once again be asked to provide data for apportionment purposes, at least in 1990 we will have information which closely approximates the Census' concept of "usual residence," the basis on which other U.S. citizens are apportioned.

Of course, our overseas enumeration will also provide us with a great deal of additional information which can be merged with decennial data gathered in the 50 states as well. It will provide us with data on the actual number of spouses and dependents overseas and on overseas employees' household structures and family characteristics and on the citizenship status of household members. Information from it will be merged with information from the decennial census to permit additional and more accurate comparisons between military and civilian compensation, which we greatly need for our Congressionally mandated quadrennial reviews of military compensation. The expanded military sample will also permit DoD to make more accurate and detailed comparisons between military and civilian families on a variety of important demographic, socioeconomic, and housing characteristics, including, for example, spouse employment and the number of youth and old-age dependents. Information like this will allow us to reassess and more accurately specify program plans concerning a variety of family-oriented programs in each of the Active Services, especially those programs related to family well-offness, day care needs, and spouse employment advisory services. In addition, we will have more information on dual military

couples to compare to data on two-earner civilian couples, which is especially important for DoD research and program planning in the areas of readiness and retention of highly trained personnel. Finally, but perhaps most importantly, the overseas census will provide information crucial to a centralized and complete database the DoD can use for complete evacuation planning in the event of a crisis.

Our overseas enumeration project entails an agreement with the Census Bureau to provide advice and technical expertise on data collection and form construction, and management of form printing. The Census Bureau will also perform data weighting and processing, including merging the overseas data with decennial data, and provide data products, such as hard-copy reports and data tapes. Under DoD's directions, a contractor will handle the overseas enumeration operations of distributing and tracking the forms, receiving them back and sending them to the Census Bureau for processing. The information will be collected on April 1, 1990. The entire project will be completed in 1994.

We have made plans to have available in 1990 data on DoD overseas employees and their dependents which can be used for apportionment purposes so that data from administrative files would not have to be used for such purposes. The Department has not made long-term plans to conduct such an overseas enumeration every ten years, however. This decision would depend upon our experiences with this first overseas enumeration effort and other factors not under Departmental control.

I close by repeating and reemphasizing that the Department feels that its overseas employees and their dependents should not be excluded from the official statistics of the United States or from the apportionment counts by virtue of their overseas residence at census time.

Again, thank you very much for this opportunity to express the view of the Department of Defense of these matters.

HOUSE OF REPRESENTATIVES
COMMITTEE ON POST OFFICE
AND CIVIL SERVICE
Washington, DC 20515-6243

Telephone (202) 228-4054

April 5, 1990

Dr. Barbara Bryant
Director
U.S. Department of Commerce
Bureau of the Census
Washington, DC 20233

Dear Dr. Bryant:

On August 1, 1989, the Bureau of the Census announced its intention to include service personnel stationed overseas in the 1990 Decennial Census. We were very pleased that our dedicated service personnel would be included for purposes of reapportionment.

Unfortunately, funding shortfalls in both the Department of Commerce and the Department of Defense have made an actual enumeration based on individual questionnaires unfeasible. At this time, an enumeration based on service records is anticipated. The next issue which must be resolved is the geographic placement of service personnel for reapportionment purposes.

In 1988, the House of Representatives voted on a measure which would enumerate service personnel at the location where they had last resided continuously for six months. In a vote of 93-317, the measure was defeated.

During debate on the floor, Members of Congres suggested a more reasonable method of enumeration. Upon entering the service, each member of the armed services must indicate a "home of record." This home of record will remain constant throughout the enlistment period and reflects the state where the individual resideded prior to enlistment. Upon discharge from service, the individual is granting a moving stipend to cover the expense of moving from the point of discharge back to the home of record.

While the Census Bureau has depended on the long-standing usual residence rule, this rule is unworkable when dealing with service personnel stationed overseas. The only administrative listing which would best describe the residence of our members of the armed forces stationed abroad is the home of record. After all, the state listed for the home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE. In a very real sense, those states had this population taken from them by federal action.

As members of the House Committee on Post Office and Civil Service, we urge you to enumerate overseas service personnel at their home of record. We look forward to working with you on this and other isues affecting the 1990-Decennial Census.

Sincerely,

/s/ William O. ?????? ????? Gilman

/s/ Tom Sawyer Tom Ridge

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, DC 20233

OFFICE OF THE DIRECTOR

May 17, 1990

MEMORANDUM FOR Michael R. Darby
Undersecretary for Economic Affairs

Barbara Everitt Bryant
Director, Bureau of the Census

From: A. Mark Neuman
Chief, Office of Congressional Affairs

Subject: Background information on overseas military ("Home of Record" v. "Last six months")

ISSUE

Which form of Administrative records for overseas military personnel will be used for apportionment purposes in the 1990 Census.

BACKGROUND

On August 1, 1989, The Department of Commerce announced that overseas military personnel would be counted in the 1990 Census and included in the state apportionment counts. The Department of Defense (DOD) originally planned to conduct an overseas *enumeration*. Overseas military personnel would be apportioned in the state where the person resided continuously for at least six months prior to leaving the country. In late December of 1989, Defense Secretary Cheney notified Secretary Mosbacher that DOD would be unable to fund this operation. This unanticipated decision reopened the issue of how overseas military would be counted for apportionment purposes.

HOME OF RECORD

Home of Record is where a member of the military *enlisted* in the service. This is *not* necessarily the same state that an individual may designate as his/her stateside residence for income tax purposes.

Cons

Feasibility:

DOD testified previously (8/1/89) that "home of record" information is missing from approximately ten percent of the active duty force. There is no comparable information for civilian DOD personnel in DOD files. There is no comparable information for civilian DOD personnel in DOD files.

Other Arguments:

"Home of record" does not necessarily satisfy a reasonable concept of "usual residence".

In a limited amount of cases, "Home of record" may be a state where an individual never actually lived. (e.g.: an individual who joins the service immediately after college and whose parents have moved from one state to another

while he/she was attending school may have his/her parent's address listed as his/her "home of record" but he/she may never have lived there.)

Pros

Feasibility:

The Congressional Research Service and The Armed Services Committee Staff have advised the House Post Office and Civil Service Committee that "home of record" information is readily available for all service personnel.

Precendent:

DOD used "home of record" data for apportionment purposes in 1970.

LAST SIX MONTHS STATESIDE

DOD has what it calls longitudinal files on where service personnel resided stateside continuously for the last six months. This information is derived principally from payroll records.

Cons

In many cases, this will be a temporary duty station. (e.g.: Fort Benning, Georgia; where Rep. Tom Ridge, R-PA, was stationed continuously for six months before he was sent to Vietnam.)

Feasibility:

The Congressional Research Service (CRS) conducted a study on longitudinal files and determined that compiling data on last duty station stateside would require a *greater*

amount of effort than home of record, which CRS contends is available for *all* service personnel.

Accuracy:

CRS also reported to the House Post Office and Civil Service Committee that there would be considerably *more* error in computing data based on last six months data.

Pros

The "last six months" definition bears a significant resemblance to the Census Bureau's concept of "usual residence".

ADDITIONAL POLICY BACKGROUND

The Decision Memorandum (CD-183) to the Secretary from Undersecretary Michael R. Darby states:

> *I recommend that you approve the decision to include military and dependents overseas in the 1990 census for apportionment, provided that there is timely receipt of acceptable data from the Defense Department.*

Deputy Director Kincannon testified* before the Subcommittee on Census and Population on August 1, 1989:

> *"DOD has plans to have availible 1990 data on its overseas employees and their dependents that can be used for apportionment purposes. If it will provide that data to us in a timely manner to meet our statutory deadlines, we can include this group with comparative ease in the 1990 apportionment totals. We are working with DOD on the form and proce-*

* This testimony was prepared at the Department of Commerce.

dures to be used. We believe that our decision to include counts of overseas members and their families in the apportionment totals will satisfy Congressional concerns about the issue and will strengthen cooperation between our agency and the Congress to make the 1990 Census a success."

LEGISLATIVE AND POLITICAL CONSIDERATIONS:

The Chairman and ranking minority members of both the House and Senate Oversight full Committee and subcommittee are *strongly* supportive of the Home of record designation. (Sawyer D-OH, Ridge R-PA, Ford D-MI, Gilman R-NY, Kohl D-WI, Rudman R-NH, Glenn D-OH, Roth, R-DE). A amendment to use "last six months residence" was overwhelmingly defeated on the House Floor in the 1987, 93-317. Supporters of "home of record" could mandate its adoption through legislation, which would almost certainly enjoy broad, bi-partisan support. Sen. Bob Kasten, a member of the Commerce, State, Justice Appropriations subcommittee, is a vocal supporter of "home of record". To date; no supporters of "last six months have voiced an opinion to the Bureau.

House Oversight members feel they were at worse, misled; and at best, not informed of the Departments's intentions in a timely manner. The (3/39/90) letter to Secretary Cheney from Secretary Mosbacher was never shared, or discussed with, or announced to any member of the Committee. Previous testimony from both the Department and the Bureau indicated that no *final* decision had been made about specific residency rules using administrative records. The 3/29/90 letter suggests a clear preference for the last six months. In effect, the letter could reasonably be interpreted as instructions to the Department of Defense not to provide home of record data. The Committee Members

are highly critical of the Department's previous insistence that this was a matter up to DOD, even though the Secretary of Commerce has the sole authority to determine the form and content of the Census.

UNITED STATES DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

May 18, 1990

Honorable Thomas C. Sawyer
Chairman, Subcommittee on Census
and Population
Committee on Post Office and Civil Service
House of Representatives
Washington, DC 20515-6245

Dear Mr. Chairman:

Thank you for your cosigned letter requesting that overseas military personnel be enumerated at their "home of record." We have examined the feasibility of this, as I agreed we would do.

The Census Bureau agreed to include overseas members of the armed forces, civilian Department of Defense (DOD) employees, and their dependents in the 1990 census apportionment count because of bipartisan support in the Congress.

The DOD testified on September 7, 1989 that "home of record" in its personnel files has a high error rate. The designation may be a place where the person has not lived for many years and, in some cases, may be a place where the employee has never lived.

The DOD further testified that none of the data elements on personnel records meets a reasonable test of validity for apportionment purposes. Therefore, it had planned to conduct an enumeration survey of its personnel overseas. After the DOD cancelled its survey in December 1989, the DOD told us that its personnel

records could be used with the 6-month rule, supplemented with a small survey, to produce data from its personnel records that are superior to the "home of record" data. The 6-month rule approximates the Census Bureau's concept of "usual residence," the basis on which other U.S. citizens are counted.

Because DOD stated that data on the "last six months" of residence in the United States are superior to "home of records" data. The 6-month rule approximates the Census Bureau's concept of "usual residence," the basis on which other U.S. citizens are counted.

Because DOD stated that data on the "last six months" of residence in the United States are superior to "home of record" and because the "last six months" data are most closely comparable to the "usual residence" definition used for enumeration in the 1990 census, the Secretary of Commerce wrote the enclosed letter to the Secretary of Defense on March 29, 1990 on procedures for counting overseas military and dependents using the "last six months" rule.

Therefore, given the DOD testimony and the information supplied to us by the DOD, we cannot now accede to your request to base the military apportionment on "home of record." However, should DOD reexamine its evidence and provide an acceptable methodology and ultimately data (by October 31,1990) based on "home of record," we would be in a position to go forward on the basis of the new evidence.

It is our understanding that the DOD needs to decide on its reference period by June 1, 1990 to produce the data in time for apportionment. So, it appears to me, that any DOD reexamination of the evidence and resulting change, if any, in its methodology must occur very soon indeed.

Thank you for your continued interest in the 1990 census.

Sincerely,

/s/ BARBARA EVERITT BRYANT
Barbara Everitt Bryant
Director
Bureau of the Census

Enclosure

[identical letter sent to Representative William D. Ford, Chairman, House Committee on Post Office and Civil Service (A.R. 832-833)]

[SEAL]

THE SECRETARY OF COMMERCE
Washington, DC 20230

MAR 29 1990

Honorable Richard Cheney
The Secretary of Defense
Washington, D.C. 20301

Dear Dick,

Thank you for your letter regarding the Enumeration of Department of Defense (DOD) Personnel and Dependents Overseas.

We are pleased to let you know that, although we are unable to fund a DOD enumeration of these groups, an alternative counting procedure has been worked out in cooperation with the Department of Defense. This procedure, involving several different forms of documentation, if completed in a timely manner, should provide a significant improvement in accuracy over the previous practice of relying solely on administrative home-of-record data for overseas counts.

Very briefly, the DOD will provide counts of *overseas military* personnel on the basis of current information about their last United States address of six months duration or longer. It will also provide counts of *military dependents* from administrative records using the same state of residence for these dependents as that recorded for their sponsors. *Federal civilian employees and their dependents* will be counted by means of a combination of administrative records and a short, self-administered questionnaire to obtain their state of residence. Finally, DOD's legal staff for the Department is currently pursuing the question of whether so-called *"non-appropriated fund*

employees" should be included in the count at all. If they are ultimately included, the Census Bureau and DOD will work out appropriate procedures for counting them. The Census Bureau is continuing to work with the Defense Manpower Data Center to achieve our mutual goal of an accurate count at minimal cost.

We are confident that, by continuing to work with Department of Defense officials to ensure that these arrangements are fully implemented, these Americans can be included in the Census count for apportionment purposes. The Department of Commerce is especially pleased to be able to institute this program for the Bi-centennial Census.

Sincerely,

/s/ ROBERT A. MOSBACHER
Robert A. Mosbacher

Identical letters were sent to:

Honorable Thomas C. Sawyer
Chairman, Subcommittee on Census and
Population
Committee on Post Office and Civil Service
House of Representatives
Washington, DC 20515-6245

Dear Mr. Chairman:

Honorable Willam D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, DC 20515-4209

Dear Mr. Chairman:

Honorable Thomas J. Ridge
Ranking Minority Member
Subcommittee on Census and Population
Committee on Post Office and
Civil Service
House of Representatives
Washington, DC 20515-3824

Dear Mr. Ridge:

Honorable Benjamin A. Gilman
Ranking Minority Member
Committee on Post Office and
Civil Service
House of Representatives
Washington, DC 20515-3222

Dear Mr. Gilman:

Dear Mr. Gilman:

CRS REPORT FOR CONGRESS

The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts

David C. Huckabee
Analyst in American National Government
Government Division

June 20, 1990

Congressional Research Service • The Library of Congress

THE 1990 CENSUS: INCLUDING FOREIGN-BASED MILITARY AND CIVILIAN PERSONNEL IN THE STATE COUNTS

SUMMARY

The Commerce Department's decision to include foreign-based Federal personnel and their dependents in the counts used for reapportioning the House of Representatives may affect the allocation of seats. Since a significant portion of this population of more than a million persons will be active duty military personnel, and at the time of this writing the only data available to analyze are from the Department of Defense, this report's focus is on Defense Department personnel. The allocation of personnel for all agencies participating in this program will be done using administrative records rather than a special overseas census. The Defense Department has three different alternative data sources that could be used for this purpose. These are using a person's: (1) *home of record*; (2) *legal residence*; or (3) *last duty station*. Each of these methods has strengths and weaknesses. Each has the potential of altering the apportionment of seats, but *home of record* is least likely to do so, followed in order by *legal residence* and *last duty station*.

The data presented in this report, and the appendices which follow, illustrate the sensitivity of the apportionment formula to small shifts in State populations. Although the Census Bureau decision to account for foreign-based personnel may not alter the total number of House seats assigned to each State, adding these people to each State's count very likely will change the order of the assignment of seats, and, under certain circumstances, the apportionment calculations may be altered enough to shift seats among the States.

TABLE OF CONTENTS

(J.A. Page)

INTRODUCTION 145
METHODS OF "COUNTING" DOD PERSONNEL 148
ALTERNATIVE DOD DATA FILES 148
CHOOSING AN ADMINISTRATIVE METHOD TO "COUNT" THE FOREIGN-BASED DOD PERSONNEL: POLICY ALTERNATIVES 151
STATE-BY-STATE DISTRIBUTIONS 152
REAPPORTIONMENT IMPLICATIONS .. 153
TABLE 1. Population Needed to Gain or Lose the Last House Seat (No. 435) .....
*APPENDIX 1. Home State Distribution of the Foreign-Based Military, Using Three Methods: Home of Record, Legal Residence, and Last Duty Station .....
*APPENDIX 2. Comparative Priority Lists Based on Series C of the Census Bureau's Populations Projections for 1990, Using Three Methods To Distribute the Foreign-Based Military Among the States .....

* Not reproduced in appendix.

THE 1990 CENSUS: INCLUDING FOREIGN-BASED MILITARY AND CIVILIAN PERSONNEL IN THE STATE COUNTS

INTRODUCTION

For the first time since 1970 and the second time in history, the Census Bureau will include non-resident Federal employees in State counts used for reapportioning the House of Representatives. The Bureau included the foreign-based military personnel in the State counts used for reapportionment in 1970 during the Vietnam War, based on their *home of record.*[1] In 1990, the Census Bureau plans to include not only the foreign-based military personnel in the State counts, but also civilian employees of the Federal Government and the dependents of both the military and civilian personnel, based on the *last duty station* of the personnel for the six months prior to the assignment outside the U.S.[2] Although the Bureau expects that most of the persons counted in this exercise will be the military and civilian employees of the Department of Defense (and their dependents), other agencies with foreign-based employees have been asked to participate as well.[3]

---

[1] U.S. Department of Commerce. Bureau of the Census. Procedural History: 1970 Census of Population and Housing. PHC(R)-1, Washington. U.S. Govt. Print. Off. 1976. p. 5-31. (See note five for a definition of *home of record.*)

[2] U.S. Congress. House. Committee on Post Office and Civil Service. Subcommittee on Census and Population. Census Equity Act. Statement of C. Louis Kincannon, Deputy Director, Bureau of the Census. Washington. U.S. Govt. Print. Off. Aug. 1, and Sept. 7, 1989, p. 45.

[3] In early March 1990, the Census Bureau wrote each of the agencies identified by OMB as having foreign-based employees, requesting that they report counts of their employees by State for apportionment purposes. In the enclosures accompanying the letter were guidelines

This deviation from the Census Bureau's traditional rule that a person should be counted at his or her *usual residence* (the place a person lives and sleeps most of the time)[4] could affect the reapportionment of House seats. The decision to count foreign-based military personnel in the States that they designated as their *home of record* in 1970 caused a shift of a seat from Connecticut to Oklahoma by fewer than 300 persons. The Bureau's decision to include Federal personnel and their dependents in the 1990 counts could affect the apportionment as well.

Two bills were introduced on May 23, 1990, to direct the Census Bureau to use a person's *home of record* for this exercise in 1990, rather than the *last duty station* concept as proposed by the Census Bureau. H.R. 4903 (Rep. Ridge, et. al.) and S. 2675, (Sen. Kohl, et. al.) both provide that the Census Bureau will ensure that foreign-based military personnel will be counted in their home State's

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for determining the State of residence of the foreign-based employees and their dependents. The agencies were directed to "consider as the 'State of Residence' the U.S. State that the person claims as his/her home when he/she is overseas. It is *not necessarily* the individual's official duty station or place of work." U.S. Department of Commerce. Bureau of the Census. Office of the Director. Sample Letter to Agency Heads. March 6, 1990. Enclosure B.

In a June 14, 1990 conversation with Al Paez, Chief, Data Requirements Branch, Decennial Planning Division of the Census Bureau, CRS learned that the Bureau expects to receive responses from all the agencies surveyed, but some may not be able to provide all the necessary information. Agencies whose foreign-based personnel are not acknowledged for security reasons, such as the CIA, DIA, and NSA, will likely not report this information to the Bureau.

[4] U.S. House of Representatives. Committee on Post Office and Civil Service. Inclusion of Overseas Federal Personnel in Censuses of Population. Report to Accompany H.R. 4720. House Report No. 100-953, 100th Cong., 2nd Sess. Washington D.C., U.S. Govt. Print. Off., 1988. p. 2.

Census totals using the *home of record* concept as defined by the Department of Defense.[5]

The method by which the foreign-based personnel are distributed may determine the impact, if any, on the apportionment of seats by the Census. In 1988, the Department of Defense (DOD) estimated "that between 1.2 and 1.6 million persons under its purview" were stationed outside the U.S. An additional 13,000 non-Defense Department government employees were estimated to be foreign-based as well.[6] Based on December 31, 1989, DOD data, 719,289 active duty military personnel were stationed outside the U.S. as of that date.[7] As of September 30, 1989, the DOD reported that 366,920 dependents of foreign-based members were outside the country, but the State residencies of these dependents had not been determined at this writing.[8]

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[5] U.S. Department of Defense. The Joint Federal Travel Regulations. Volume 1, Uniformed Services Members. Appendix 1. 1988.

"A Home of Record is the place recorded as the home of the individual when commissioned, appointed, enlisted, inducted, or ordered into the relevant tour of active duty. The place recorded as the home of the individual when reinstated, reappointed, or reenlisted remains the same as that recorded when commissioned, appointed, enlisted, or inducted or ordered into the relevant tour of active duty unless there is a break in service of more than one full day. Only if a break in service exceeds one full day, can the Home of Record be changed by the Member."

[6] Inclusion of Overseas Federal Personnel in Censuses of Population, p. 3.

[7] U.S. Department of Defense. Office of the Assistant Secretary of Defense. Force Management and Personnel. Defense Manpower Data Center (DMDC). Active Duty Overseas Associated With State by Home of Record, Legal Residence and Last Duty Station, 31 December 1989. (Typescript).

[8] U.S. Department of Defense. Directorate for Information Operations and Reports (DIOR). Worldwide Manpower Distribution by

METHODS OF "COUNTING" DOD PERSONNEL

At the time that the Bureau decided that it would include foreign-based DOD personnel in the State counts used for reapportionment, an actual enumeration by means of a questionnaire was envisioned. The Defense Department would have borne the cost, and the Census Bureau would have assisted the DOD in producing a questionnaire. In December 1989, the Secretary of Defense wrote the Secretary of Commerce, stating the DOD would be unable to provide funds for the questionnaire. Instead, the DOD agreed to provide the necessary information from automated administrative records.[9] Thus the DOD response will be in a form similar to the other agencies participating in this program. Since the vast majority of the persons to be added to the State counts will be DOD personnel (all but approximately 13,000), this analysis will focus on the DOD data which could be used for the task.

Alternate DOD Data Files

Department of Defense automated records which could be used to adjust the census apportionment population to account for the foreign-based military personnel and their dependents include: (1) the officer and enlisted active duty files; (2) the Joint Uniformed Military Pay System (JUMPS) files; (3) the Military Entrance Processing Command data (MEPCOM) files; and the Dependents Eligibility Reporting System (DEERS) files.

Geographical Area. September 20, 1989. p. 71. The DMDC is planning on assuming that personnel who are reimbursed for bringing their families overseas—an accompanied tour—will have done so. In fact, some families do not accompany members on accompanied tours, and some personnel pay the expenses of having their families with them, so this measure will only approximate the number of dependents.

[9] Telephone conversation with Emma Moreno. Office of Congressional Affairs. Bureau of the Census. June 1, 1990.

Data elements in these files suggest three methods that could be used to "repatriate" military personnel and their dependents to the States for purposes of reapportionment. These are *home of record* which is "declared by the member at entry and reflects the State to which he or she will be moved upon separation"[10] (available on the officer and enlisted active duty personnel files); "*legal residence* which is the "State of residence a member declares for tax purposes"[11] (available on the JUMPS files); and *last duty station* in the U.S. (available on the officer and enlisted active duty personnel files).

The Defense Manpower Data Center (DMDC) provided a table to the Assistant Secretary of Defense for Force Management and Personnel in May 1990, listing foreign-based active duty personnel as of December 31, 1989. Data from this table is reproduced in appendix 1. Of the 719,289 foreign-based active duty personnel, records of State locations were most complete in the JUMPS file with 6,143 unknowns (.85 of the total), followed by 29,748 unknowns in the *last duty station* list (4.14 percent), and 51,379 unknowns based on *home of record* (7.14 percent).

The *last duty station* listing was produced by using the most recent automated active duty officer and enlisted personnel files in conjunction with the military entrance processing command data (MEPCOM) files. These files are updated quarterly, so DMDC compared the December

[10] U.S. Department of Defense. Office of the Assistant Secretary of Defense. Force Management and Personnel. Defense Management Data Center (DMDC). DMDC Procedures Used in Determining Relevant CONUS Locations of Active Duty Overseas Personnel. (Typescript). May 19, 1990.

[11] Ibid.

31, 1989, personnel files with the September 30 files; if a duty station matched in the United States for an individual, that duty station was deemed to be his last duty station. If no match occurred, similar attempts were made using the quarterly data files back to June of 1982. It should be noted that this listing does not necessarily identify the *last duty station* where the member resided for the *six months* prior to the foreign assignment.[12] Instead, it shows the last stateside duty station regardless of the length of time the service member spent at this location. The last duty station where the member spent a total of six months could be determined from these data files but was not done in this case.

The *home of record* listing was also produced by using the most recent automated active duty officer and enlisted personnel files. No effort was made to cross-check the unknowns with other files or earlier versions of the same file. Although earlier versions of this file and the MEPCOM file may reduce the number of unknowns, the *home of record* is an entry which rarely changes. Thus, the same methods which reduced the *last duty station* unknowns to 29,748 may not be as successful for *home of record*. One way of reducing the *home of record* unknowns would be to use the *legal residence* variable in the JUMPS files to substitute for *home of record* if the *home of record* cannot otherwise be determined.

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[12] The six-months-residency requirement is the rule that was envisioned by the Census Bureau and is consistent with H.R. 4720, a bill introduced by Representative Dymally in the 100th Congress, that was reported by the Post Office and Civil Service Committee on September 22, 1988. The bill subsequently failed passage by a vote of 93-317 on September 28, 1988. U.S. Congress. House. Committee on Post Office and Civil Service. Inclusion of Overseas Federal Personnel in Census of Population. Report No. 100-953; 100th Congress, 2d Sess. Washington. U.S. Govt. Print. Off., 1988.

The State of residence a member declares for tax purposes—available on the JUMPS (payroll) files—makes up the *legal residence* listing. (Home State data for nonmilitary Federal employees may only be available from payroll records.)

CHOOSING AN ADMINISTRATIVE METHOD TO "COUNT" THE FOREIGN-BASED DOD PERSONNEL: POLICY ALTERNATIVES

Each of the Defense Department's alternatives for counting the foreign-based military personnel has its own strengths and weaknesses. The *home of record* method may well reflect the person's own concept of his or her home State, but at the end of a person's term of Federal service, he or she may not return to that State. The *legal residence* method reflects the State to which the person chooses to pay his or her taxes, but a person may choose a low or no tax State to claim as a legal residence.[13] The *last*

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[13] It is not clear how easy or difficult it is for military personnel to claim a State for tax purposes. The Soldiers and Sailor's Relief Act (U.S.C. 50 App. 574) provides that persons transferred in military service "shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision . . . solely by reason of being absent therefrom in compliance with military or naval orders." This provision does not prohibit military personnel from changing their residences for tax purposes. Instead, it allows them to maintain previously held legal residences for tax purposes when they move pursuant to military orders. Presumably, one would need some form of tie with a State, such as property ownership, or having been stationed in a State in order to change a legal residence, but it is interesting to note that the nine States with either no income taxes, or those which tax only interest and dividend income, have approximately 9 percent more of the overseas military personnel claiming the States for tax purposes, than those same States receive using *home of record*. Two of the States, Florida and Texas, account for approximately 7 percent of the difference. This is not to say that only low, or no, tax

duty station for the six months prior to receiving the foreign assignment method may reflect the place where the person last resided—a concept that is comparable to the Census Bureau's *usual residence* rule. But the *last duty station* may not necessarily indicate the State where a person lives because a person's duty station may be in a different State than where he or she resides. If approximating the *usual residence* rule is most important consideration in apportioning the foreign-based DOD personnel to the States for the 1990 Census, then one could argue that *last duty station* is the appropriate choice because it best approximates the *usual residence* rule. But one could argue contrarily, since "repatriating" the foreign-based DOD personnel is a violation of the *usual residence* rule, that other criteria should be considered.

State-by-State Distributions

One possible criterion for evaluating the alternative methods of counting DOD personnel, is how the State-by-State distributions of personnel compare to the distribu-

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States receive "bonuses" of personnel using *legal residence* as compared to *home of record*. California receives a nearly 1 percent bonus, even though the States ranks 39 out of 50 in tax income derived from income taxes (based on 1985 tax collections ranked from smallest to largest).

In 1985, the range of tax revenue obtained by the States from income taxes range from 0 to 66 percent of the State's total tax revenue. The median percentage was 29.6 percent. Eleven states with income tax collections below the median using *legal residence* gained foreign based military as compared to *home of record*. Four States exceeding the median incme tax receipts also gained using the *legal residence* distribution over using *home of record*. These data were calculated from data contained in The Council of State Governments. *The Book of the States*, 1988-89 Edition. Table 6.7: State General Revenue, By Source and By State: 1985., p. 234.

tion of the total U.S. population among the States. Appendix I reports these data for each State, as well as summary statistics for each proposed alternative. Based on this criterion, allocating personnel based on the *home of record* is closest to the population distribution of the entire population. *Legal residence* varies from the distribution of the entire population nearly three times as much as *home of record*, and *last duty station* varies ten times as much.[14]

Another possible criterion for judging whether to choose one method of counting over another would be to check to see how each method would affect the apportionment of seats in the House of Representatives.

Reapportionment Implications

The reapportionment process for the House is based on rounding principles, but the actual process is carried out on computers by means of computing a "priority list" of seat assignments for the States. The First fifty seats are constitutionally mandated because each State must have at

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[14] The variance of *home of record* from the projected 1990 population distribution used in Appendix 1 was .38. The variance for *legal residence* was 1.09, while the variance for *last duty station* was 3.98.

The variance measures the degree to which individual values in a list vary from the average (mean) of all the values in the list. High variances indicate that the values vary greatly; low variances mean the values are similar. If all values in the lists are identical, the variance is zero.

Another way of looking at the differences between the measures would be to sum the difference each of three alternatives and the projected 1990 population distribution. This results in a sum of the differences for *home of record* of .00000000000001, but using the absolute value in this exercise (summing the variances disregarding the sign) produce a total of 17.08. The same procedure for *legal residence* yields a sum of the differences of 7.06 and an absolute value of 26.39. Interestingly, the sum of the differences regardless of sign for *last duty station* is .000000000000002, but the absolute value is 66.33.

least one Representative.[15] The remaining 385 seats (for a total of 435) are assigned by means of priority list (see appendix 2). The priority list method has been used by the Census Bureau to apportion the House since early in the 20th century. The priority list is a useful tool for identifying which States either are in danger of losing a House seat or those States that just missed gaining or retaining a seat.[16]

Since the apportionment of seats in the House varies in proportion to the distribution of the population among the States, the DOD personnel allocation method which best matches that proportional distribution will be least likely to affect the apportionment of House seats. From the analysis described above, *home of record* would be less likely to affect the apportionment than either *legal residence* or *last duty station*. Very small differences in populations, can affect apportionments (and have done so). In fact, as mentioned previously, the decision to allocate the foreign-based military personnel in 1970 based on *home of record* resulted in Oklahoma receiving a seat that Connecticut would have otherwise obtained.

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[15] Article I, Section 3, of the Constitution as modified by clause 2 of the Fourteenth Amendment requires that "Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers."

[16] The "priority list" rankings are calculated using the reciprocals of the geometric means of successive numbers ($1/\sqrt{n(n-1)}$ where "n" is the number of seats to be allocated to the State). The geometric mean (the square root of the product of two adjacent numbers) was chosen as the rounding point rather than the arithmetic mean (the midpoint between two adjacent numbers) by the Congress in 1941. For a detailed explanation of how the apportionment formula works see: U.S. Library of Congress. Congressional Research Service. Apportioning Seats in the House of Representatives: The Method of Equal Proportions. Report 88-143 GOV, by David C. Huckabee. Washington, 1988.

Appendix 2 and table 1 below, illustrate the volatility of the apportionment formula by displaying the "priority lists" of House seat assignments around the last (435th) seat allocated in the House. Two of these DOD allocation methods (*home of record* and *legal residence*) *in this example* do not change the apportionment (but they do somewhat change the *order* in which the seats are assigned).[17] The apportionment based on *last duty station*, however, shifts a seat from Wisconsin to Georgia. From the distribution percentages in appendix 1 alone, California would appear more likely than Georgia to gain a seat. Table 1, shows, however, that Georgia just misses the 435th position by 16,669 persons using *home of record.*[18] The allocation based on *last duty station* alters the calcuations enough to enable Georgia to displace Wisconsin to take the 435th position. Thus, Wisconsin would need to gain 13,226 *additional* persons to retain its 9th seat using *last duty station*, and 12,289 *fewer* persons to lose its 9th seat using *home of record.* California by contrast would need 47,758 fewer persons to obtain another seat using *last duty station* compared to *home of record*, but the State's relative position (439) stays the same. This example illustrates that the States most likely to be affected are those right at the margin of gaining or losing a seat rather than a seat going to the State that gains the most in the DOD personnel allocation (unless, of course, that State is very close to the margin). It should be noted that this illustration uses only one of four different Census Bureau

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[17] Different population projections will likely result in different priority rankings, and hence different States ranked at, or near the 435th seat cutoff.

[18] This example, and all the others in table 1, are based on the assumption that the State population needed to gain or lose a seat is calculated for each State assuming all other State populations remain unchanged. In all likelihood, if one State's population were to be adjusted in some fashion, other State's populations also would change.

projections of population for 1990, and that other projections (and the actual Census results) may place different States adjacent to the 435th seat. It should also be noted that these calculations only account for the foreign–based military personnel. Data on dependents and civilian personnel were not available at the time this report was prepared.

FORM CD-183
(REV. 3-88)

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: ☒ The Secretary ☐ The Deputy Secretary Control No.:

Date:

DECISION MEMORANDUM

From: Michael R. Darby
Under Secretary for Economic Affairs

Prepared by: B.E. Bryant/Census/US EA/763-5190

SUBJECT: Counting the Overseas Military and Civilian Employees in the Decennial Census

BACKGROUND: This memorandum is to follow up on your July 6 conversation with Senator Herbert Kohl (D-WI), Chairman of the Subcommittee on Government Information and Regulation that oversees the Census Bureau.

Reacting to bipartisan Congressional support, the Department of Commerce has agreed to include the number of overseas U.S. military and Federal civilian employees and their dependents living with them in the 1990 apportionment counts. You sent a letter to Defense Secretary Richard Cheney stating the Census Bureau is intending to use data provided by the Department of Defense (DOD) based on the last U.S. address of 6 months duration or longer. Census Bureau Director Barbara Bryant later wrote to Chairman William D. Ford and other Congres-

sional members reiterating that position unless the DOD showed compelling reasons to use other information.

Based on new information supplied to the Department of Commerce by senior Defense Department officials, it appears now that DOD does not have the capacity to assemble data on the last U.S. address (residence) of 6 months duration. Service personnel declare their home of record upon entry into the service and upon reenlistment. Home of record follows the enlistee throughout his or her tour and is used to determine the travel stipend granted upon discharge. Approximately 10 percent of DOD's personnel files do not list a "home of record." The DOD now believes it can collect these missing data through a new survey currently under review by the Office of Management and Budget.

Legislation directing the Secretary of Commerce to include overseas military members and their dependents in the apportionment counts based on "home of record" data passed the House on June 25, 1990. The Senate Government Affairs Committee is scheduled to consider a corresponding proposal, S. 2673 (introduced by Sen. Kohl), this Friday, July 13, 1990.

RECOMMENDATION: Based on new information from DOD, which indicates that the complete "home of record" data will constitute the most accurate data available from the Department of Defense, I recommend that the Department of Commerce express no objections to the passage of the Senate bill (S. 2673). We believe that the new "home of record" data, supplemented with additional information DOD plans to collect, will satisfy our criterion that the best quality data be used for the 1990 census.

DECISION:

Approve _____ X_____ Disapprove _____

	PREPARED BY	CLEARED BY	CLEARED BY
SURNAME & ORGANIZATION (Please type)	BEBryant Dir./Census	CAO/Census	Ch.C./EA
INITIALS AND DATE	*B.E.Bryant* 7-10-90	*Ann* 7/10/90	7-11

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FORM CD-183
(REV. 3-88)

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: ☒ The Secretary ☐ The Deputy Secretary Control No.:

Date:

INFORMATION MEMORANDUM

From: Michael R. Darby
Under Secretary for Economic Affairs

RE: Including Overseas Military Personnel in 1990 Census Count

Summary: An agreement has been reached with the Department of Defense to include overseas military personnel and their dependents in the 1990 census counts to be used for reapportioning the U.S. House of Representatives. Such persons will be included in the counts based on the home of record designated in their personnel files. It is expected that nearly one million persons will be added to the reapportionment counts as a result.

Background: In June 1989, the Department of Defense (DOD) requested that the Department of Commerce include overseas military personnel and their dependents in the 1990 census reapportionment counts. Excepts for the 1970 census, when DOD had supplied the data necessary to include such persons, overseas military personnel and their dependents had not traditionally been included in the decennial census counts due partially to the infeasibility of achieving an accurate count of such persons.

In order to ensure accuracy of the 1990 census, DOD proposed to conduct a special enumeration of its overseas personnel and their dependents. At that time, proposed legislation to mandate inclusion was being considered by Congress and appeared to have strong bipartisan support. Based on these factors, we agreed to include such individuals in the 1990 reapportionment counts.

In December 1990, DOD informed us that, due to budget constraints, it could not fund the overseas enumeration project and requested that Commerce fund the project or, alternatively, accept counts based on existing administrative records. Due to our own budget constraints at that time, we could not fund the overseas enumeration but agreed to accept data from existing DOD records provided that the data were received on a timely basis and were of sufficient quality for reapportionment purposes. While a DOD official had previously testified that existing data did not meet "a reasonable test of validity for apportionment purposes," DOD assured us in December that such data would be supplemented and improved by methodologies devised by technical experts who designed the overseas enumeration.

Earlier this month, DOD identified three alternative means for determining the home state affiliation of overseas military personnel. The alternatives are legal residence, home of record and last U.S. duty station. After reviewing these methods, we decided to use home of record as the basis for including overseas personnel and their dependents in the count. Census Bureau technical staff believe that among these, home of record is the most consistent with the concept of "usual residence" used for two centuries as the basis for determining residency in the decennial census.

In a recent letter to House Armed Services Committee Chairman Les Aspin, Assistant Secretary of Defense Christopher Jehn stated that last duty station most closely approximates the "usual residence" concept. However, because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia). The option of using legal residence was rejected because in many cases legal residence may be a place where the person has never lived.

While Assistant Secretary Jehn's letter indicated that approximately ten percent of DOD's personnel files are missing home of record data, DOD has agreed to use all automated records available to supplement these files in order to provide data of sufficient quality for apportionment purposes. Bureau staff will work closely with DOD staff to assure the quality of those data.

	PREPARED BY	CLEARED BY	CLEARED BY
SURNAME & ORGANIZATION (Please type)	L. West	Fifi	C/C
INITIALS AND DATE		*fe* 7/24	*CC*7/24/90

CLEARED BY	CLEARED BY	CLEARED BY	CLEARED BY
C. Jones	Scarr	Howard	Plant
w/Chng 7/24	*HAS* 7-24-90	*Sut* 7-24-90	7/20/90

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

July 13, 1990

MEMORANDUM FOR Michael R. Darby
Under Secretary for Economic Affairs

From: Charles D. Jones (Signed) Charles D. Jones
Associate Director for Decennial Census

Subject: Overseas Military

Given all the information currently available to us, the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available.

We recommend that we use the Home of Record for the inclusion of overseas military in the apportionment counts with the details of the procedures to be worked out by the technical staffs of DoD and the Census Bureau.

EXHIBIT D

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for Economic Affairs
Washington, D.C. 20230

July 23, 1990

Honorable Thomas C. Sawyer
House of Representatives
Washington, D.C. 20515

Dear Mr. Sawyer:

As you are aware, the Department of Commerce (DOC) reached an agreement with the Department of Defense (DOD) last year to include overseas military personnel and their dependents in the 1990 census counts to be used to reapportion the U.S. House of Representatives. It was agreed that the home state affiliation of such persons would be determined in a manner as consistent as possible with the concept of "usual residence" used by the Census Bureau for two hundred years to count the nation's population.

After reviewing the alternative data sources identified by DOD for providing such counts, DOC has decided to use home of record designations in existing DOD administrative records rather than the legal residence or last U.S. duty station of military personnel to determine home state affiliation. Census Bureau technical staff believe that home of record is most consistent with our policy for determining residency.

In a recent letter to House Armed Services Committee Chairman Les Aspin, Assistant Secretary of Defense Christopher Jehn stated that last duty station most closely approximates the "usual residence" concept. However, be-

cause last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia). The option of using legal residence was rejected because in many cases legal residence may be a place where the person has never lived.

While Assistant Secretary Jehn's letter indicated that approximately ten percent of DOD's personnel files are missing home of record data, DOD has agreed to use all automated records available to supplement these files in order to provide data of sufficient quality for apportionment purposes. Bureau staff will work closely with DOD staff to assure the quality of those data.

Sincerely,

/s/ MICHAEL R. DARBY

Michael R. Darby
Under Secretary
for Economic Affairs

[Identical letters were sent to Senator Herbert H. Kohl (A.R. 926) and Representative Les Aspin (A.R. 927)]

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for Economic Affairs
Washington, D.C. 20230

September 11, 1990

Honorable John W. Warner
United States Senate
Washington, D.C. 20510-4601

Dear Senator Warner:

Thank you for your cosigned letter inquiring about the method to be used by the Department of Defense (DOD) for counting its overseas personnel. We requested that DOD furnish these data, which will be combined with counts from other Federal entities and results of the 1990 census for reapportioning seats in the House of Representatives. As required by Title 13, United States Code, we will be delivering the reapportionment counts to the President before the end of the year.

After considering the three alternatives discussed with DOD for developing their military personnel counts, we concluded that the "home-of-record" data best satisfy our technical and conceptual needs, despite the absence of state designations for about 7 percent of DOD's overseas personnel records. To fill this gap, staff of the Defense Manpower Data Center (DMDC) will use supplemental data from their automated records. We understand that the number of missing state designations will be negligible.

Among DOD's alternative counting methods, the home-of-record data are the most compatible with our concept of usual residence, a principle directed by the Congress in the Census Act of 1790. Military personnel designate their home of record upon entry into the Armed Forces and upon re-enlistment; this designation generally remains

with each member until discharge or retirement and is used to determine the travel stipend at the conclusion of military service.

"Last duty station," the main alternative to home of record, reflects the general location of the duty post where a military person is assigned. Those assigned to the Pentagon, for example, would be counted as residents of the District of Columbia even though they lived in Virginia or Maryland. As a result, military personnel and their dependents would be designated with jurisdictions other than their actual previous residence in the United States. Another alternative, "legal residence," was rejected because personnel may designate a place where the employee was assigned at any point during military service, no matter how brief the assignment or how distant in time. We do not use "legal residence" in the census.

Thank you for your interest in the 1990 census.

Sincerely,

/s/ Mark W. Plant for

Michael R. Darby
Under Secretary
for Economic Affairs

[Identical letters were sent to Senators Pete Wilson (A.R. 933-934), Charles S. Robb (A.R. 935-936), Alan Cranston (A.R. 937-938), Sam Nunn (A.R. 939-940), and Wyche Fowler, Jr. (A.R. 941-942)]

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

[AUG 15, 1990]

Dr. Hermann Habermann
Chief, Statistical Policy Office
Office of Information and Regulatory
Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Hermann:

Thank you for your letter concerning the inclusion of overseas Department of Defense (DOD) employees and their dependents in the 1990 apportionment counts. Since your letter, several developments have occurred on this issue. The following information explains those events and our current plans for including overseas DOD military and civilian employees and their dependents in the census.

On March 29, 1990, Commerce Secretary Robert A. Mosbacher wrote to Defense Secretary Richard Cheney stating that, for the purpose of including military members in the 1990 apportionment counts, the Census Bureau intended to use data provided by the DOD based on the last U.S. address of 6 months duration or longer. I later wrote to Representative William D. Ford, Chairman of the House Post Office and Civil Service Committee, and several other Congressional members reiterating that position unless the DOD could show compelling reasons to use other information.

Legislation directing the Secretary of Commerce to include overseas military personnel and their dependents in

the apportionment counts based on DOD "home of record" data passed the House on June 25, 1990 and was under consideration in the Senate.

In a July 11 response to a letter from Chairman Les Aspin of the House Armed Services Committee that questioned the type of data available from DOD's administrative records, the Assistant Secretary of Defense for Force Management and Personnel stated that DOD's personnel files could show home state affiliations three different ways: by legal residence, by last duty station in the United States, or by "home of record."

According to DOD's letter, however, the agency does not have readily available information to determine with precision the state in which its overseas members last maintained an actual residence in the United States. By using DOD's data on last duty station, for example, military personnel whose last work assignment in the United States was the Pentagon would show as being located in Washington, D.C. In actuality, that person may have resided in Virginia, Maryland, or the District of Columbia.

The DOD's "home of record" data, on the other hand, are provided by service personnel upon entry into the armed forces and upon reenlistment. "Home of record" follows the enlistee throughout his or her tour of duty and is used to determine the travel stipend granted upon discharge. While DOD acknowledged in its July 11 letter that "home of record" data include the greatest number of "unknowns," it pledged to use all available automated records to provide the necessary data to assist the Census Bureau in fulfilling its responsibilities. The DOD believes that the use of its automated records will "improve the quality of the data sufficient for purposes of reapportionment."

Based on this information from DOD and given the strong Congressional support for the use of "home of

record" data, the Department of Commerce agreed on July 13, 1990 to use this administrative data set, supplemented with additional information from DOD's automated records, as the basis for including the number of overseas military personnel and their dependents in the 1990 apportionment counts.

To obtain counts of its overseas civilian employees and their dependents, DOD will use a combination of administrative records and a short, self-administered questionnaire to collect the necessary information on their last stateside residence. The Office of Management and Budget approved the request for the survey on July 2, 1990, and we understand that DOD will begin data collection shortly. The DOD's counting methods will ensure against double counting individuals in situations where overseas dependents of military members also are employed by a component of DOD.

In a similar arrangement with other Federal agencies, the Census Bureau will include counts of their overseas civilian employees based on data from administrative records provided by participating agencies.

I trust this information is sufficient to explain our plans for including Federal military and civilian employees and their dependents living with them in the 1990 population counts used for apportionment purposes. My staff will continue to work with technical specialists at the DOD on the details of the procedures to be used. This will help to achieve our mutual goal of using the best quality data for the 1990 census.

Thank you for your interest. Please contact me if you have any further questions.

Sincerely,

/s/ C. F. KUICANI
for Barbara Everitt Bryant
Director
Bureau of the Census

STIPULATION OF FACTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 91-11234 WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

STIPULATION OF FACTS

The parties stipulate, for purposes of this litigation only, that the facts set forth in these stipulations are true. By so stipulating, the parties do not admit that anything set forth herein, or in any document referenced in or attached to this Stipulation, is relevant or material to any issue in this case. As to the documents attached as Exhibits to this Stipulation or referenced in the Administrative Record, the parties stipulate that those documents are true and authentic copies of the originals, were authored by

the agencies and/or persons whose names appear thereon, and are what they purport to be.

COUNTING FEDERAL OVERSEAS EMPLOYEES

1. The federal decennial census is conducted pursuant to the requirement imposed by the Fourteenth Amendment and Article I, Section 2, Clause 3 of the U.S. Constitution to enumerate "the whole number of persons in each state" as the basis for apportionment of seats in the U.S. House of Representatives.

2. Subject to the requirements of Article I, Section 2, Clause 3, and the 14th Amendment to the U.S. Constitution, Congress may enact legislation governing the rules and practices of the Census Bureau in conducting the decennial census. Through 13 U.S.C. §§ 141 *et seq.*, Congress has delegated responsibility for conducting the census to the Secretary of Commerce. In turn, the Secretary of Commerce has delegated that responsibility to the Director of the Bureau of the Census.

3. To enumerate the population of the United States for Congressional apportionment, the Census Bureau establishes enumeration rules ("who" should be counted) and residence rules ("where" should they be counted) to deal with the various situations that will or may prevail at the time of the census. Attached as Exhibit A is a true copy of a Census Bureau memorandum that states the enumeration and residence rules to be used for the 1990 census.

4. Since the first census in 1790, the Census Bureau has used the concept of "usual residence" as the guiding principle in formulating enumeration and residence rules for the conduct of each census.

5. The "usual residence" concept, as applied by the Census Bureau, provides that persons should be included in the census counts at the place where they are living and

sleeping most of the time, as of the date that the census is taken.

6. In conducting the 1990 census and previous censuses, the Census Bureau provided instructions to respondents and census takers that described the concept of "usual residence," as well as other enumeration and residence rules, to determine who should or should not be included on the census questionnaire for particular living quarters.

7. While completing a questionnaire or answering questions from census takers, respondents, rather than the Census Bureau, determine their "usual residence." This information is used for purposes of congressional apportionment. Respondents also interpret the enumeration and residence rules supplied on the questionnaire or by the census taker in determining who they should report as being residents or a particular living quarters. Attached as Exhibit B are true copies of the instructions provided to respondents with the 1990 census questionnaire, and residence rules provided to census enumerators for the 1990 census.

8. In an August 15, 1983 intra-agency memorandum regarding residence rules issues for the 1990 Census, the Census Bureau defined "usual residence" operationally as where a person spends four nights a week, or more than 182 days in the calendar year. The instructions to the Official 1990 U.S. Census form define "usual residence" as the place where the person lives and sleeps most of the time. Under literal application of these definitions in 1990, the "usual residence" of military personnel stationed overseas is their overseas post.

9. During the 1990 census, the Census Bureau followed the procedure described above to count and apportion persons who were residing within the fifty states on the census date, including federal civilian and military

employees and their dependents. The Census Bureau did not determine the usual residence of U.S. military personnel and federal civilian employees and their dependents stationed overseas (hereinafter "overseas federal employees") using the enumeration and residence rules set forth in Exhibit A or the questionnaire set forth in Exhibit B. Instead, in 1990 the Bureau apportioned overseas federal employees to states following other procedures that are described below.

10. For the 1990 and prior censuses, with the exception listed below, the Bureau's enumeration and residence rules stated that Federal military personnel stationed in the United States and its territories were to be counted at the living quarters where they were usually living and sleeping at the time of the census. For example, persons stationed on military bases within the United States were counted at their living quarters whether on or off base. The same enumeration and residence rules stated that such military personnel should not be included in living quarters where they might be considered household members (such as a place they had lived before entering military service or where they intended to live after leaving military service), if they were living elsewhere while serving in the military. Except as described below this also was true of military personnel residing (usually living and sleeping) outside the United States at the time of the 1990 and prior censuses. For the 1900 census, the instructions to enumerators stated as follows: "If a soldier, sailor, or marine (officer or enlisted man), or civilian employee in the service of the United States at a station at home or abroad, is a member of a family living in your district, he should be enumerated as a member of that family, even though he may be absent on duty at the time of the enumeration."

11. With the exception of the instruction for the 1900 census set forth immediately above, the instructions set

forth in the preceding paragraph were not used to enumerate sailors. The 1990 instructions for sailors appear at pages 7-8 and 14-17 of Exhibit A to this Stipulation. That Exhibit also describes other instructions that have been used to enumerate sailors in prior censuses.

12. For the 1990 and prior censuses, except 1900, the Bureau's enumeration and residence rules stated that overseas federal employees, who might be considered a household member for a particular living quarters, but who were residing (usually living or sleeping) elsewhere at the time of the census, should not be included on the questionnaire for that living quarters. This included any employees residing outside the boundaries of the United States at the time of the census.

13. Overseas federal employees who, as of the census date, were living or stationed in areas which were outside the fifty states but within U.S. sovereignty, for example Puerto Rico, Guam, Virgin Islands and American Samoa, have in past censuses been enumerated in the areas they resided on the census data and not apportioned to any state. In 1900, such employees were enumerated outside the United States, and domestic enumerators also received the instruction set forth in paragraph 10. In 1990, such persons were enumerated and also allocated back to their "home" state for apportionment purposes.

14. During the time period between the ratification of the Constitution and the later ratification of the Fourteenth Amendment, the federal government did not change its definition or its application of the "usual residence rule" in the conduct of censuses.

15. In 1790 and subsequent censuses, enumerators counted indentured servants and slaves for apportionment purposes at the place where they were living as of the census date.

16. During the nineteenth and early twentieth centuries, significant numbers of American soldiers served at duty stations and military posts located outside of any state of the United States. The Department of War also employed civilians at such stations and posts. Some such soldiers and civilians had dependents who lived with them. Such stations and posts were located in the western territories of the United States, Alaska, Hawaii, the Canal Zone, and the Phillipines, as well as other locations.

17. During the nineteenth and twentieth centuries, the War Department maintained records of the states in which its soldiers and employees had lived before entering federal service or considered their permanent homes. Prior to the 1970 census, federal authorities did not use such records to apportion soldiers and employees to particular states.

18. In 1830 and 1840 and in every census since 1900, the Census Bureau has obtained administrative counts of at least a portion of the American population living overseas as of each census date. With the exceptions of 1970 and 1990, the Census Bureau has included such persons, including overseas federal employees, only as part of the total population of the United States, and has not included them in the population of any state, either for apportionment of congressional seats or for any other tabulation or use of census data.

19. For purposes of apportionment of soldiers to states, the United States government first promulgated a specific written rule in connection with the 1880 census. The rule was: "All soldiers of the U.S. Army, and civilian employees, and other residents at posts or on military reservations will be enumerated in the district in which they reside, equally with other elements of the population."

20. The Census Bureau has not adopted any formal regulation governing the apportionment of overseas federal employees or dependents to particular states.

21. For the 1950 through 1990 censuses, enumeration and residence rules instructed respondents and enumerators that students staying (usually living and sleeping there) at a particular living quarters (at the time of the census) while attending college were to be included on the questionnaire for that living quarters. The same rules instructed respondents and enumerators for living quarters where a student might be considered a household member (such as their family home) not to include them if they were living somewhere else while attending college.

22. For the 1900 through 1940 censuses, respondents and enumerators were instructed that students who were enrolled in colleges and living away from their families on the census date were to be included on the census questionnaire for their parent's residence rather than the census questionnaire for their college residence.

23. For the 1900 and subsequent censuses, respondents and enumerators were instructed that students in boarding schools and staying (usually living and sleeping there) away from their families on the census date were to be included on the census questionnaire for their parents' residence rather than the census questionnaire for their boarding school residence.

24. For the 1850 and subsequent censuses, the Census Bureau's enumeration and residence rules stated that persons residing (usually living and sleeping) in institutions such as a prison, a mental hospital, or a nursing home at the time of the census were not to be included on census questionnaires completed for addresses where they might be considered a household member, such as the place they had lived before commitment, or where they intended to live after their release from the institution. Instead, these

institutionalized persons were counted on census questionnaires at the institutions where they resided.

25. Congress has debated proposals which would have amended the Constitution to exclude illegal aliens from census apportionment counts. No such proposal has been approved by Congress or enacted into law.

26. The 1970 and 1990 censuses are the only times that the Census Bureau has included, as a separate group, counts of overseas Federal employees living in foreign countries on the census date in the population counts used for purposes of congressional apportionment.

27. In a letter of October 15, 1969 to the Deputy Assistant General Counsel of the Department of Commerce, then-Assistant Attorney General William H. Rehnquist concluded that "the Director of the Census may, in his discretion, validly adopt" a procedure to secure information as to the "home state" of military personnel, civilian employees of the government, and their dependents, and to allocate such persons to their respective home states for inclusion in the population counts used for apportionment. A true copy of that letter appears at pages 14-15 of the Administrative Record.

28. In 1970, during the Vietnam War, the Census Bureau included counts of overseas federal employees for the apportionment of congressional seats (but not for other tabulations or uses of census data). The State of Connecticut lost a seat, and the State of Oklahoma gained a seat, as a result of the inclusion of these persons. The number of congressional seats allocated to the Commonwealth of Massachusetts was not affected by this 1970 decision. Members of the Army, Air Force, and Marine Corps stationed overseas were apportioned based on their home of record. The dependents of the land based military, crews of Navy vessels assigned to the 6th and 7th fleets, and overseas Federal civilian employees and their

dependents were self-enumerated using the Overseas Census Report, a form requesting their "home state."

29. A July 1976 report by the federal Advisory Commission of Intergovernmental Relations showed that some military personnel selected as their "home state" one with low or no income taxes rather than their "true" home state. In Congressional testimony in September 1976 and in Census Bureau documents prior to the 1980 Census, officials from the Census Bureau stated that "data on the home state listed in the personnel records of American military personnel stationed overseas are of unknown reliability." Officials from the Census Bureau testified in September 1976 that for this reason, and because the number of Americans abroad had been cut in half, from 1.6 million in 1970 to 930,000 as of September 30, 1975, the Bureau had determined not to include overseas military in the apportionment population. See A.R. 49-65.

30. In the 1980 census, the Census Bureau did not include counts of any overseas federal employees for the apportionment of congressional seats.

31. Census Bureau began planning for the 1990 census in the Fall of 1983. As of October 15, 1987, the Census Bureau had decided not to include any of the overseas population in the census counts used for apportionment.

32. The document that appears on pages 213-36 of the Administrative Record is a Policy Paper dated April 7, 1987, prepared by the Director of the Bureau of the Census concerning Enumeration and Residence Rules for the 1990 Census. That Policy Paper states the official policy of the Census Bureau as of the date it was created.

33. During the 100th Congress, several bills were introduced that would have required the inclusion of overseas military personnel in censu counts for apportionment purposes. These bills included H.R. 3814, H.R. 4234, H.R. 3815, H.R. 4720, and S. 2103. See A.R. 367,

296-97, 284-85, 414-19, 291-92. Both H.R. 3814 and H.R. 4234 also would have required the exclusion of illegal aliens from census counts used for apportionment. The House Committee on Post Office and Civil Service which had oversight responsibility for the Census Bureau, passed H.R. 4720 on September 14, 1988. The full House considered H.R. 4720 on September 28, 1988, but a majority (317 to 93, with 21 not voting) voted not to suspend rules, and thus did not pass the bill. The 100th Congress did not enact any legislation addressing the question of whether or not overseas federal employees should be apportioned to states in the census, or how any such apportionment should be done.

34. In a June 8, 1988 letter to the Chairman of the Committee on Post Office and Civil Service, the General Counsel of the Department of Commerce stated that the Department opposed the enactment of H.R. 4720 (A.R. 414-19). A true copy of that letter which stated the official views of the Department on H.R. 4720, appears at pages 365-66 of the Administrative Record.

35. The letter attached as Exhbibit C is a true copy of a letter dated April 14, 1988 from the U.S. Department of Justice to James Miller, Director of the U.S. Office of Management and Budget.

36. In two August 11, 1988 letters concerning the enumeration of overseas personnel, the Census Bureau stated that "according to the usual residence concept, the 1990 census counts for apportionment will not include military personnel living outside the United States . . . on census day."

37. During the 101st Congress, the following bills were introduced that would have required the inclusion of overseas military in the counts used for congressional apportionment: H.R. 1468, H.R. 2661, H.R. 3016 and S. 290. See A.R. 474-79, 491-92, 506-09, 839-40, 459-60,

845-46. H.R. 1468 and H.R. 3016 would also have required the inclusion of overseas civilian employees of the United States in apportionment counts. Two of those bills, H.R. 1468 and H.R. 2661, also required exclusion of illegal aliens from the counts used for apportionment. In addition, the following bills were introduced requiring the exclusion of illegal aliens from the counts used for apportionment: H.C.R. 195, H.J.R. 199, H.R. 744, S. 848. See A.R. 775-76, 472-73, 461-63, 484-86. None of the bills listed above passed either the House or the Senate. The 101st Congress did not enact any legislation addressing the question of whether or not overseas federal employees should be apportioned to states in the census.

38. On July 31, 1989, while the 101st Congress was in session, Secretary of Commerce Robert Mosbacher decided to include counts of overseas Federal employees in the 1990 census count for purposes of congressional apportionment. A true and complete copy of a document showing the Secretary of Commerce's statement of reasons for the decision appears at pages 511-12 of the Administrative Record. On August 1, 1989, the Department of Commerce publicly announced this decision. A true copy of the press release issued by the Department at that time appears at page 735 of the Administrative Record.

39. At a September 7, 1989 congressional committee hearing on H.R. 2661, Census Bureau Deputy Director C.L. Kincannon announced that the Census Bureau would include counts of overseas Federal employees for apportionment purposes. A true copy of the September 7, 1989 Kincannon testimony appears at pages 758-74 of the Administrative Record.

40. A true copy of a letter sent in March 1990 from the Secretary of Commerce to the Secretary of Defense appears at 834 of the Administrative Record.

41. A true copy of a letter sent in May 1990 from the Director of the Census Bureau to Congressman William Ford appears at 832-3 of the Administrative Record.

42. As a result of the Census Bureau's decision to include overseas federal employees in census counts for purposes of congressional apportionment in the 1990 census, the Commonwealth of Massachusetts will lose one seat (relative to the previous apportionment in 1980 and to the number of seats it would have received if overseas federal employees had not been apportioned to states) in the House of Representatives. If overseas federal employees were excluded from apportionment counts, the State of Washington would lose one seat in the House, as compared to its apportionment if such employees were included.

43. In discussions with the Census Bureau and members of Congress concerning the 1990 census, the Department of Defense discouraged the use of "home of record" as the criterion for apportioning military personnel to specific states because: 1) its personnel records had a high rate of error with respect to "home of record;" 2) home of record may be a place where a person has not lived for many years and, in some cases, may be a place where the person has never lived; and 3) home of record information was missing for 7 to 10% of the active force and was entirely unavailable for civilian DOD personnel.

44. In Congressional testimony in 1989, DOD officials testified that "none of the data elements contained in DOD personnel records (i.e., home of record, tax residence, voting residence) meets a reasonable test of validity for apportionment purposes."

45. In 1989, prior to the Census Bureau's decision to include overseas federal employees in the apportionment population, the Department of Defense planned to do an actual enumeration of its overseas employees. DOD stated

to the Bureau that it intended to survey its military and civilian employees, either in person or by questionnaires, to determine which state, if any, they considered their permanent home. The DOD's stated intent to conduct an actual enumeration of its employees was a significant reason for the Secretary of Commerce's July 31, 1989 decision to change the Department's prior policy and to include DOD's overseas employees for apportionment purposes. A memorandum approved by the Secretary stated that he also based this decision on the "growing bipartisan Congressional support" for including the overseas military in the apportionment counts and on then-Assistant Attorney General Rehnquist's legal opinion on the issue.

46. In December 1989, DOD cancelled its plans to do an actual enumeration of its employees for the 1990 census apportionment due to a lack of funds.

47. Following the cancellation of its planned enumeration, DOD stated to the Census Bureau that it could provide data on the "last six months" of residence in the United States that were superior to its data on "home of record." For this reason, and because at that time the Census Bureau believed that the "last six months" data was more closely compatible with the concept of "usual residence," than the data elements contained in the DOD's personnel records, the Census Bureau determined as of March 29, 1990, that it would base the apportionment of overseas military employees in the 1990 census upon the "last six months" rule rather than home of record.

48. Between June 19, 1990, and July 10, 1990, DOD informed the Census Bureau that it did not have the ability to assemble data on the last U.S. address of six months' duration for its overseas employees.

49. On May 23, 1990, two bills were introduced in Congress concerning the method by which members of the overseas military would be apportioned to their "home

states." H.R. 4903 and S. 2675 both would have required the Census Bureau to apportion members to their home states using the member's "home of record." On June 26, 1990, the House passed H.R. 4903. The 101st Congress did not enact any legislation addressing the question of how such apportionment should be done.

50. On or about July 10, 1990, after DOD had informed the Census Bureau that it could not provide data on last U.S. address of six months' duration, the Census Bureau decided that it would apportion DOD's overseas employees to particular states based on their "home of record" as listed in DOD records.

51. After informing the Census Bureau that it could not provide data on its members' last U.S. residence of six months' duration, DOD identified three alternative means for determining the home state affiliation of its overseas military personnel: legal residence, home of record, and last duty station. A.R. 921. In a July 23, 1990 letter to Representative Thomas Sawyer, Michael Darby, Under Secretary for Economic Affairs, stated the Commerce Department's reasons for its decision to apportion overseas federal employees based on home of record. The letter that appears at A.R. 925 is a true copy of the July 23, 1990 Darby letter. See A.R. 925.

52. In an August 1, 1989 press release, the Census Bureau stated that the DOD estimated that it had 1.2 to 1.6 million overseas employees.

53. The actual number of overseas federal employees included in the 1990 census apportionment count was 922,819. 919,810 of these were apportioned to states; the remainder were apportioned to the District of Columbia. The number of overseas employees attributed to the DOD was 901,880.

54. In the February 29, 1991 Final Status Report on the Overseas Count Project, the Census Bureau stated

"that the DOD total count of 901,880 overseas personnel/dependents was less than estimated because: 1) the DOD estimated range was for a period when the levels of military deployments overseas were higher than on Census day, 2) the DOD estimated range included U.S. Navy personnel who, in accordance with the census rules of residence, were not considered to be overseas and were covered by census procedure that applied to the U.S. resident population, and 3) given the 20-percent response to the civilian survey, overseas civilians and dependents were missing from DOD's final submission of counts to the Census Bureau."

55. Of the 40 federal agencies that were invited to submit counts of overseas employees for apportionment purposes in the 1990 census, 30 actually submitted such counts. Of the 30 reporting, 20 included dependents and 10 did not. Four of the reporting agencies could not provide a home state for all of their overseas employees.

56. In the 1990 census, overseas military personnel and their dependents were assigned to states for purposes of apportionment based on home of record. If the Department of Defense ("DOD") did not have a home of record for a member of the military, the member's, and his or her dependent's, home state was determined on the basis of the member's legal residence (with last duty station being used if legal residence was not available). Pursuant to the above procedures, there remained 1,846 military personnel and dependents who were counted but were not apportioned to states because their home state could not be determined.

57. Because the DOD did not have home of record information available for its civilian employees for the 1990 Census, it sought to determine the home states of civilian employees stationed overseas through their responses to a questionnaire circulated by DOD. The DOD sent questionnaires to 61,205 of its overseas civilian employees. The DOD did not send questionnaires to dependents of its civilian employees; rather, those persons were intended to be assigned according to the employees' responses. The DOD received completed questionnaires from approximately twenty percent of all such civilian employees. Those employees who did not respond, and their dependents, were not assigned to any state for apportionment purposes. Employees who did respond were asked to identify a home of record, legal residence, and last duty station. As with military personnel records, home of record was used first, then legal residence, and finally last duty station. Other federal agencies were instructed to determine the home states of their employees, and their dependents, stationed overseas, based solely on their administrative records.

58. In conducting the 1990 census, the Census Bureau did not require or verify that federal overseas employees and their dependents were apportioned to the state in which they had elected to vote. Nor did the Census Bureau require or verify that individuals in the United States were apportioned to the state in which they had elected to vote.

APPORTIONMENT FORMULAS

59. The Census Bureau conducts the decennial census to determine the whole number of persons in each state, and then calculates the apportionment of seats in the U.S. House of Representatives among the states. The calculation of the apportionment is based upon the method of equal proportions, also known as the Hill-Huntington method (hereinafter the "Hill method"), as required by Title 2, United States Code, Sections 2a(a), 2b. These results then are conveyed to the President through the Secretary of Commerce. The President then transmits to

the United States Congress (the Congress) a statement of the whole number of persons in each state and the number of representatives in the Congress to which each state is entitled, as ascertained under the decennial census. The Clerk of the U.S. House of Representatives (the House) then notifies each state (via a Certificate of Entitlement) of the number of representatives in Congress to which it is entitled.

60. The Congress has legislated four methods for apportionment since the first census of 1790. In 1941, Congress codified in Title 2 of the United States Code laws that govern the method currently used and the process for apportionment. Article I, Section 2 of the Constitution requires that Congress apportion House seats according to population, but does not allow for fractional House seats nor districts which cross state lines. Congress must apply some method to round off each state's otherwise fractional number of seats.

61. In 1792 Congress legislated use of the Jefferson method (also known as the method of greatest divisors) of apportionment after the first census in 1790. This method was used after each subsequent census through 1830. Under this method, the population of each state was divided by a fixed ratio (a pre-specified number of persons per representative) and the resulting integer was the size of the state's delegation, regardless of the size of the fractional remainder. For example, if the ratio for a particular state was 3.4, the state would receive 3 representatives. If the ratio was 3.9, the state still would receive 3 representatives. This method did not require that the size of the House, i.e., the total number of representatives, be a fixed number (in fact, the method would have to be modified for use with a fixed House size). Instead, the size of the House was the sum of the number of representatives given to each state using the above method. The size of the

House grew over time based on apportionments following the 1790, 1800, 1810, 1820, and 1830 census.

62. Following the 1840 census, the Congress legislated use of the Webster method (also known as the method of major fractions (hereinafter "Webster method")) for the apportionment calculation. As then employed, with no mandate that the size of the House be fixed, it used a fixed ratio (of a pre-specified number of persons per representative), but an additional seat was assigned for each fractional remainder greater than one-half. For example, if the ratio for a state was 3.2, the state received 3 representatives. But if the ratio was 3.9 (or anything greater than 3.5, but less than 4.5), the state received 4 representatives. This method also did not require that the size of the House be a fixed number (and in fact would need to be modified for use with a fixed House size); the total number of representatives again was the sum of the representatives allocated to each state under this method.

63. Congress legislated use of the Vinton method (also known as the Hamilton method) for apportionment following the censuses of 1850 through 1900. It utilized a fixed number of representatives. In this method, the apportionment population of the United States was divided by the fixed size of the House to derive a national-average-size Congressional district. The population of each state was then divided by this national-average-size Congressional district to obtain an exact quota of representatives. (This is known as the "House seat quota"). One representative was assigned to each state whose exact quota was less than one (to meet the Constitutional requirement that each state receive at least one representative). The other states (having quotas greater than or equal to 1.0) were assigned a seat for each whole number of their respective quotas, and any remaining seats were assigned on the basis of the highest fractional remainders for those states.

Under this method, it is mathematically possible that a state could receive fewer seats if the size of the House were increased and the population of all states remained constant. This anomaly is known as the "Alabama paradox", because it was observed that for the 1880 census, Alabama would receive eight seats with a House size of 299 and seven seats with a House size of 300 by the use of the Vinton method.

64. In 1910, Congress legislated use of the Webster, or major fractions, method. Congress also fixed House membership at 433, with the proviso that "if the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial census they shall have one Representative each. . . ." 37 Stat. 14 (1911). Both Arizona and New Mexico became states in 1912 and House membership has been 435 since that time, except when it was increased temporarily when Alaska and Hawaii became states in 1959.

65. Congress could not decide on an apportionment plan following the 1920 census, but in 1929 passed a law that made reapportionment automatic, using whatever method was used for the previous apportionment in the event the Congress did not agree on another method.

66. Using results of the 1930 census, both the Hill method and the Webster method produced the same apportionment. The Congress did not legislate any method of apportionment, so as a result of the 1929 legislation, the apportionment for 1930 was automatic and was based upon the Webster method (because it had been used for the previous (1910) apportionment).

67. In January 1941, the President transmitted to Congress apportionments based upon both the Hill method and the Webster method. The methods produced the same apportionment except for two states, Arkansas

and Michigan. The Hill method resulted in an additional seat for Arkansas; the Webster method resulted in an additional seat for Michigan. Congress debated the apportionment methodologies and enacted legislation adopting the Hill method, by a vote in which every Democrat (except those from Michigan) voted for, and every Republican voted against, the bill. No legislation affecting the method of apportionment has been passed by Congress since 1941. As a result, the Hill method has been used for each subsequent apportionment, including 1990.

68. One of the products of the lengthy debates in the Congress regarding apportionment following the 1920 census, was the Congress' commissioning the National Academy of Sciences (NAS) to prepare a report "regarding the mathematical aspects of the problem of reapportionment". The report of the Committee on Apportionment discussed five methods "now known which are unambiguous (that is, lead to a workable solution)": smallest divisors (Adams method), harmonic means (Dean method), equal proportions (Hill method), major fractions (Webster method), and greatest divisors (Jefferson method). With a fixed House size, apportionments under these five methods are calculated using formulas involving each state's apportionment population and a divisor which determines each state's priority for its next seat (after one seat is assigned to each state). The divisors for the different formulas are functions of the number of seats already assigned to a given state which vary according to specific goals that each method is designed to achieve.

69. The report of the National Academy of Sciences committee, submitted to Congress in 1929, stated that the committee preferred the Hill method. The report analyzed five methods: Adams, Dean, Hill, Webster and Jefferson. It listed them in the order in which they "favor the larger States as compared with the methods which precede it"

(the Adams method favoring the small states the most, Jefferson's favoring the large states the most, and the Hill method listed third among the five); and stated that Hill's method "occupies mathematically a neutral position with respect to emphasis on larger and smaller states". (Report of the National Academy of Sciences Committee On Apportionment from the Annual Report of the National Academy of Sciences, Fiscal Year 1928-29, pp. 20-23).

70. In 1948, Congress asked the National Academy of Sciences to re-examine the various apportionment methods. An NAS committee concurred with the conclusion of the 1929 report.

71. Following both the 1970 and 1980 decennial censuses, Congress conducted hearings regarding methods of Congressional apportionment.

72. The apportionment method used in 1990, pursuant to Congressional legislation in force since 1941, was the Hill method. Using this method, Massachusetts received 10 seats under the apportionment based on the 1990 census.

73. If the Webster method for apportionment based on the 1990 census had been used (either excluding or including the counts of overseas military, other Federal employees, and dependents), Massachusetts would have received 11 seats. The Webster method may be applied as follows: a) A divisor would be found by dividing the apportionment population by 435 (the total number of seats) to produce the national average size district. b) Each state's apportionment population would then be divided by the above divisor to obtain a quotient consisting of a whole number (possibly zero) and a fraction. c) If a state's quotient was less than 1.0, it would be rounded up to 1.0 no matter how small the fraction. d) For all other states (those with a quotient greater than or equal to 1.0), fractions less than one-half (0.5) would be rounded down, and

fractions greater than one-half (0.5) would be rounded up. e) If the whole numbers resulting from this process summed to 435, the apportionment would be determined and no alteration of the divisor would be needed. f) If too many seats, or too few seats, were allocated by this process, the divisor would be made larger or smaller, respectively, until the total number of whole numbers achieved after rounding was equal to 435.

74. Under the Hill method, 1) each state first receives one Representative, as required under the Constitution. 2) A series of priority values is calculated for each state from which can be determined the state's entitlement to a second Representative, a third, and so on. 3) When the priority values are arranged in sequence (from highest to lowest), they indicate which state should get the 51st Representative, which the 52nd, etc. up through the 435th Representative. 4) The priority values are determined by multiplying the apportionment population of each state by the reciprocal of the geometric mean of the number of seats already assigned, a, and the next integer, $a+1$, i.e., 1 divided by the square root of the quantity $a(a+1)$. Alternatively, the apportionment under the Hill method could be obtained as described in paragraph 73 for the Webster method, with one-half (0.5) replaced by the following quantity: the square root $a(a+1)$, minus a, where a is the largest integer not exceeding the state's quotient. For example, if the quotient is 2.7, then the square root of (2×3) minus 2 is approximately 0.449.

75. For quotients greater than one, the Hill rounding point is less than .50. The larger the whole number in a state's quotient, the larger is the Hill rounding point. For example, if a state's quotient falls between 1 and 2, then its Hill rounding point is the square root of 1×2, minus 1, which is approximately .414. If a state's quotient falls

between 20 and 21, then its Hill rounding point is the square root of 20 × 21, minus 20, which is approximately .494.

76. For quotients greater than one, the Webster rounding point is always .50 exactly.

77. The rounding points in the previous two paragraphs are not always indicative of how the Webster and Hill methods would round the exact quota of a state. For the 1990 census, New York, New Jersey, Massachusetts, and Oklahoma have exact quotas of 31.521, 13.536, 10.532 and 5.516, respectively. The fractional portion of the quota for each of these four states is above the rounding points for both the Webster and the Hill methods. Yet, the Webster method rounds down the exact quota for each of these states except Massachusetts and the Hill method rounds down the exact quota for each of these states except Oklahoma. Other examples exist in previous censuses where the exact quota is below the rounding point for both Webster and Hill and where either the Hill or Webster methods, or both, round up the exact quota.

78. If the Webster and Hill methods yield different apportionments, then the Hill method, as compared with the Webster method, awards fewer seats to the state or states with larger populations and more seats to the state or states with smaller populations. For example, in 1990, Webster's method gives one more seat to Massachusetts, which has a larger population, rather than to Oklahoma, which is given the extra seat under the Hill method.

79. Exhibit D displays the number of seats which would have been apportioned to Massachusetts based on the 1990 census under seven different apportionment methods. The number of seats that Massachusetts would receive varies depending on the method used and whether the overseas military, Federal employees, and dependents

are included (Apportionment Population) or excluded (Resident Population).

80. By dividing the apportionment population by the total number of seats in the House of Representatives (435), a national-average-size congressional district can be obtained.

81. When the national-average-size congressional district is divided into the apportionment population of a state, the mathematical result is that there is (except for the three smallest states) a whole number of congressional seats plus a fraction of a seat, known as the "House seat quota."

82. All methods of apportionment result in House seat quotas which contain fractions which must be rounded to whole numbers. Any rounding of a House seat quota results in some states receiving more seats than their House seat quota and some states receiving less seats than their House seat quota.

83. Exhibit E displays Massachusetts' House seat quota and the number of seats which would have been apportioned to it under the Hill and Webster methods from 1940-1990.

84. According to 1990 decennial census, Massachusetts was the thirteenth most populous state.

85. Massachusetts has been among the thirteen most populous states according to every decennial census since 1940.

86. In every one of the six apportionments from 1940-1990, the total number of seats allotted to the thirteen most populous states by the Hill method was less than the sum of their House seat quotas. In five out the six apportionments from 1940-1990, the total number of seats allotted to the thirteen most populous states by the Webster method was less than the sum of their House seat quotas.

87. Under the 1990 Census, Massachusetts will receive twelve electoral votes under the Hill method. Under the Webster method it would receive thirteen electoral votes.

DATED this 1st day of November , 1991.

/s/ DWIGHT GOLANN
Dwight Golann
William P. Lee
Steve Berenson
Assistant Attorneys General
One Ashburton Place, Rm. 2019
Boston, MA 02108-1698
(617) 727-2200

/s/ MARK H. MURPHY
Sandra Schraibman
Mark H. Murphy
Attorney, Dept. of Justice
Civil Division, Room 3708
10th & Pa. Ave., N.W.
Washington, D.C. 20530
(202) 514-5124

Counsel for Executive Branch Defendants

/s/ JOHN P. DRISCOLL, JR.
/s/ EDWARD P. LEIBENSPERGER
/s/ NEIL P. MOTENKO
John P. Driscoll, Jr.
Edward P. Keibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, MA 02110-2669
(617) 439-2000
Counsel for Plaintiffs

5348e

EXHIBIT A

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

[OCT 15, 1987]

1990 DECENNIAL CENSUS
POLICY MEMORANDUM NO. 12

MEMORANDUM FOR: Distribution List

From: Charles D. Jones [CJ]
Associate Director for Decennial Census

Subject: Enumeration and Residence Rules for the 1990 Census

The attached policy paper defines the enumeration and residence rules for the 1990 Decennial Census of Population and Housing (Attachment 1). These rules address the fundamental issues of whom we will enumerate in the 1990 census and where we will enumerate them.

In preparing this policy paper, the Census Bureau re-examined the constitutional, legal, and historical basis for the enumeration and residence rules established for the first decennial census of 1790 and used with minor modifications for all subsequent decennial censuses. In developing this policy paper for 1990, the Census Bureau considered carefully the operational as well as the legal implications of the traditional rules. In December of 1986, the Census Bureau also contracted for a conference of experts—demographers, statisticians, data users, and analysts from both the public and private sectors—and

solicited their advice and recommendations for the appropriate enumeration and residence rules for the 1990 census. The attachment also contains the recommendations, some of which the Census Bureau incorporated in the policy paper, from that conference (Attachment 2).

The Census Bureau will incorporate these enumeration and residence rules in the design of forms, procedures, and instructions for the 1990 census.

Attachments

Attachment 1

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS EXECUTIVE SUMMARY

The *enumeration* and *residence* rules for the 1990 census provide the basis for determining *who* to count in the 1990 census and *where* to count them.

The application of enumeration and residence rules must support the goal of obtaining the most accurate counts possible for all geographic areas. To determine these rules, the Census Bureau examined past practices in light of questions about legal residence within the United States as a criterion for enumerating a person, whether to count a person where found or contacted on Census Day or at another location based on established criteria, and the application of these rules to specific population subgroups. The Census Bureau also sought advice from experts outside the Census Bureau as part of this examination of past practices. The results of this examination are the enumeration and residence rules described in this document.

The first census of 1790 established enumeration and residence rules. From the outset, *enumeration rules* were based on constitutional and statutory requirements. The constitutional basis for the first census required the enumeration of all residents of the United States, not just citizens. The Census Bureau has followed this principle in all subsequent censuses and will follow it for the 1990 census.

Residence rules also were based on statutory requirements. The Census Act of 1790 covering the first decennial census established the concept of usual residence as the guiding principle for determining where to count a person. The usual residence concept requires the Census Bureau to

count a person where he or she lives and sleeps most of the time or where he or she considers the usual residence. The Census Bureau has followed this concept, with minor exceptions, in all subsequent censuses and we are adopting it again for the 1990 census.

In selecting the enumeration and residence rules for the 1990 census, the Census Bureau has identified certain groups for whom questions have been raised concerning the application of these rules. These groups and the related enumeration and residence decisions reached for 1990 are as follows:

Enumeration Rules

- The Census Bureau will count American citizens living in the United States on Census Day.
- The Census Bureau will count military personnel and their dependents living overseas by using administrative records but will not include them in the apportionment counts or any other tabulations for states.
- The Census Bureau will count Federal employees and their dependents living overseas by using administrative records but will not include them in the apportionment counts for any other tabulations for states.
- The Census Bureau will not count other American citizens residing overseas who are not members of the Armed Forces or Federal employees, and their dependents. However, the Census Bureau will investigate the feasibility of using administrative records to obtain counts of Americans residing overseas who are employed by multi-national corporations.

- The Census Bureau will count aliens, whether documented or undocumented, residing in the United States on Census Day.
- The Census Bureau will not count foreign diplomats residing on the premises of an embassy or legation on Census Day; the Census Bureau will count those not residing on the premises of an embassy or legation on Census Day.

Residence Rules

- The Census Bureau will count persons away from their usual residence on Census Day at their usual residence.
- The Census Bureau will count persons with multiple residences at the residence that they consider to be their usual residence.
- The Census Bureau will count persons with no usual residence, such as the homeless, where they are found living or staying on or near Census Day.
- The Census Bureau will count persons living away from the parental home at a college or university at their college or university residence.
- The Census Bureau will enumerate persons living away from the parental home at a boarding school as residents of their parental home rather than as residents of their boarding school.
- The Census Bureau will count crews of American-flag maritime vessels at their usual residence, whether on board ship or on shore.
- The Census Bureau will count land-based members of the Armed Forces residing in the United States at their usual residence, whether it is on base or off base.

- The Census Bureau will count crews of military ships not deployed to the U.S. Navy's 6th Fleet (Atlantic) or 7th Fleet (Pacific) and crews of U.S. Coast Guard vessels at their usual residence, whether it is on board ship or on shore. The Census Bureau will treat crews of U.S. Naval ships deployed to the 6th or 7th Fleet as part of the overseas population.
- The Census Bureau will count persons who move on or near Census Day at the place they consider to be their usual residence on Census Day (April 1, 1990).
- The Census Bureau will count migrant workers either at the camp where the Census Bureau contacts them or at their usual residence if they report one.
- The Census Bureau will count persons residing in a long-term care or custody facility as residents of the their institution. The Census Bureau will count persons in a short-term care or custody facility at their usual residence.

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS

I. *INTRODUCTION*

The decennial census of the United States is one of the few Federal programs specifically mandated by the Constitution. Article I, Section 2, clause 3 states:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

(Passage of the Fourteenth Amendment to the Constitution in 1868, following the abolition of slavery, modified Article I, Section 2, clause 3.) This mandate, which the Census Bureau has now fulfilled 20 times, calls for an enumeration of the Nation's inhabitants for apportioning the seats in the House of Representatives.

An ideal census includes every person. Historically, this ideal has not been achievable.[1] As far back as the first census of 1790, President Washington recognized the limitations of a complete count as an achievable goal:

> . . . one thing is certain, our *real* numbers will exceed, greatly, the official returns of them; because the religious scruples of some would not allow them to give in their lists; the fears of others that it was intended as the foundation of a tax induced them to conceal or diminish theirs, and thro' the indolence of

the people, and the negligence of many of the officers, numbers are omitted.[2]

Although no U.S. census has ever achieved a complete or perfect count, the Census Bureau must develop procedures and strategies for the 1990 census that ensure the most accurate counts possible for all geographic areas. The purpose of this paper is to discuss the enumeration and residence rules that the Census Bureau will use to count the population in 1990. Specifically, it will present the decisions for determining who to count and where to count them in the 1990 census.

II. *THE GOAL OF THE 1990 CENSUS*

The practical goal of the 1990 census is to determine, as of April 1, 1990, the number of people residing in each geographic area of the United States, Puerto Rico, and the outlying areas. As with any goal, one must select strategies that provide the best opportunity for accomplishment. The Census Bureau has examined the various enumeration and residence rules and has identified those that offer the best opportunity to achieve the goal of the 1990 census. Within legal constraints, the Census Bureau has considered carefully the technical, operational and, in some cases, historical criteria in defining the universe of interest and determining how to count that universe. Section III of this paper presents the historical guidance for defining the universe of interest and defines several mutually exclusive subsets of the population. Section IV documents the Census Bureau's plans for counting these subsets of the population in 1990.

III. *DEFINING THE UNIVERSE OF INTEREST*

Over the years, the specified universe of interest for the census has changed. In the 1790 census, there were exclu-

sions defined by the Constitution and statutory law. For example, the Constitution excluded "Indians not taxed" from the first 15 decennial censuses. The ninth decennial census of 1870 did provide for the enumeration of Indians who were not part of the established tribes and thus were taxed. The 1940 and subsequent censuses included Indians following the U.S. Supreme Court ruling in 1936 that subjected *all* Indians to Federal taxation.[2]

According to the Constitution, the apportionment counts of the early census excluded two-fifths of "all other persons" (that is, slaves). The provision to include only three-fifths of all slaves in the apportionment count remained until the census of 1870 following passage of the Fourteenth Amendment to the Constitution in 1868. Section 2 of the Fourteenth Amendment states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Thus, except for these two groups, the Census Bureau has attempted to count all persons in each state for apportionment purposes. To achieve that goal, however, we must refine this seemingly simple rule by legal as well as operational considerations.

The planners of the first decennial census in 1790 provided a precedent that in general we have adopted for all subsequent decennial censuses in this country. In deciding where to count a person, we adopted the concept of usual residence to address the constitutional requirements. Simply stated, the concept of usual residence requires counting a person where he or she lives and sleeps most of the time or where he or she considers the usual residence. One should not overlook the importance of this concept as a cornerstone of the Nation's 20 censuses. It has provided

a practical and workable solution to the problem of where to count persons. With few exceptions, it is the residence concept that the Census Bureau again is adopting for the bicentennial census of 1990.

In deciding who to count and where to count them, it is useful to list, within the legal parameters, the possibilities or universe of interest. We can divide the possibilities into three major categories: resident citizens, nonresident citizens, and resident noncitizens. The list that follows defines the *possible* groups to include in the decennial census count for apportionment purposes.

RESIDENT CITIZENS

Resident citizens include all persons who are U.S. citizens, either by birth or by naturalization, whose usual residence is within one of the 50 states. Although some resident citizens live in the District of Columbia, Puerto Rico, or certain of the outlying areas (Guam, the U.S. Virgin Islands, and the Northern Mariana Islands), we do not include them in the apportionment count.

NONRESIDENT CITIZENS

This category includes persons who are citizens of the United States but whose usual residence on Census Day is not within the 50 states.

RESIDENT NONCITIZENS

This category includes persons whose usual residence on Census Day is in the 50 states, but who are not citizens of the United States. This group includes aliens, whether documented or undocumented, and foreign diplomats.

The above groups define whom we should or should not include in the decennial count. Questions on where to

count persons within these groups are applicable to the following subgroups:

- The noninstitutionalized civilian population, which includes, for example:
  - Persons temporarily away from their usual residence on Census Day.
  - Persons with no permanent residence on Census Day.
  - Persons away from the parental home and living at college on Census Day.
  - Persons away from the parental home and living at boarding school (elementary or secondary) on Census Day.
  - Persons with multiple residences on Census Day.
  - Crews of U.S. merchant vessels.
  - Persons moving between usual residences on Census Day.
  - Persons residing in migrant labor camps on Census Day.
- The institutionalized civilian population, which includes, for example:
  - Persons in correctional institutions on Census Day.
  - Persons in long-term health care institutions on Census Day.
- The military population, which includes, for example:
  - Land-based military personnel.
  - Crews of U.S. military vessels (including the U.S. Coast Guard).

IV. *ENUMERATION AND RESIDENCE RULES FOR 1990*

A. *CONCEPTUAL BASIS FOR ENUMERATION AND RESIDENCE RULES*

The Census Bureau establishes enumeration rules in response to the question of whom to include in the decennial census count. In establishing the enumeration rules, the Census Bureau relies on constitutional considerations, any relevant statutory requirements, and operational factors. Traditionally, the Census Bureau has understood the Constitution to mean that it must count persons (as opposed to citizens, property owners, or adults) who are inhabitants of the United States as of Census Day.

As the enumeration rules address "who to count" the residence rules address "where to count" a person, that is, where to assign a person geographically in the census files. In addressing this question, the Census Bureau must decide whether to count the person where found or contacted on Census Day or whether to count the person at another location based on established criteria.

Both legal and operational issues influence the decision on which residency option to use. The Census Act of 1790 stated:

> That every person whose usual place of abode shall be in any family on the aforesaid first Monday in August next, shall be returned as of such family. . . . Every person occasionally absent at the time of the enumeration . . . belongs to that place in which he usually resides.

The drafters of the Census Act of 1790 implemented the constitutional mandate by developing the concept of usual residence as the criterion for determining where to count a person. All subsequent censuses have used this concept to determine where to count a person.

Carefully designed and executed procedures based on the usual residence concept afford the best opportunity to achieve the goal of obtaining accurate counts for all geographic areas in 1990. The adoption of usual residence as the main residency rule for 1990 does not mean that the Census Bureau will not modify that rule. Such has been the case for our most recent censuses—we used physical location as the criterion for where to count the homeless, used "home of record" as the criterion for where to count the overseas military population in 1970, and included boarding school students (elementary and secondary) in the count at their parental home rather than at their school residence.

Along with the questions of whom to count and where to count them, the enumeration and residence concepts also encompass temporal considerations. We have traditional taken censuses as of a specific date, the idea being to capture an image of the population as of that specific date. The Census Act of 1790 established the first Monday in August 1790 as the census reference date, even though the U.S. marshals and their assistants did not complete the enumeration until 18 months later.[3] The actual reference date of the census has changed frequently over the psat 200 years in response to operational considerations. The reference date used in most censuses during the 19th century was June 1. January 1 was the scheduled date for the census of 1920 to accommodate an agriculture census taken at the same time.[4] The Census Bureau first established the date of April 1 for the 1930 census and it has used that date up to the present time. Title 13, United States Code mandates the specific date for the 1990 census—April 1, 1990.

While April 1, 1990 is the reference date for the census, the complexity and time frame of the census-taking operations are such that the Census Bureau will not contact

everyone on that date. The anticipated exceptions are noted in sections IVB and IVC below.

B. *ENUMERATION RULES*

1. *RESIDENT CITIZENS*

Resident citizens are part of the persons in Article I, Section 2 of the Fourteenth Amendment. The apportionment count will include those living in the 50 states.

2. *NONRESIDENT CITIZENS*

The overseas population includes Armed Forces members, Federal civilian employees, the dependents of these groups as well as other American citizens living abroad on Census Day. Before the 1950 census, U.S. Attorney General J. Howard McGrath, in an opinion dated August 26, 1949, said that the Congress had vested the Director of the Census Bureau with the discretion to determine procedural issues, including the enumeration of Americans abroad. Assistant Attorney General William H. Rehnquist reaffirmed McGrath's opinion in 1969.[5]

Thus, the decision on whether to count this population subgroup is discretionary. It rests on operational feasibility and efficiency with respect to obtaining accurate counts, and, to a certain extent, on data user needs. Since 1900, the Census Bureau has obtained administrative counts of at least a portion of this population subgroup. In 1970, as a result of the unusually large number of Americans (both military and civilian) involved in Vietnam, the Census Bureau counted military and Federal civilian employees and their dependents overseas and included them in the apportionment totals.[5] The procedure followed in

1970 was not based on a change in the Census Bureau's traditional understanding of the Constitution or other laws governing the apportionment process, but rather it was an effort to comply with the spirit of the law due to the large numbers of persons overseas. The Census Bureau has not included counts of other Americans living abroad in any census apportionment totals.

In 1980, the Census Bureau obtained administrative counts of military and Federal civilian employees and their dependents overseas. Since the unusual circumstances of war time did not exist in 1980, the official census tabulations for states did not include these counts. Finally, the Census Bureau did not attempt to obtain counts of other Americans overseas in 1980.

The specific categories of Americans overseas and the Census Bureau's enumeration rules for them in 1990 follow.

MILITARY PERSONNEL AND THEIR DEPENDENTS LIVING OVERSEAS

This category includes members of the Armed Forces and their dependents stationed overseas. It also includes crews of military ships deployed to the Navy's 6th (Atlantic) or 7th (Pacific) Fleet.

The Department of the Defense frequently updates and verifies administrative record counts of the overseas military personnel and their dependents.[6] Since the Census Bureau can obtain counts of persons in this category efficiently from Department of Defense administrative records, we plan to obtain the counts in 1990 and include them in the U.S. Summary

Report on Number of Inhabitants.* We will not include the counts in the official totals for the states since the assignment to geography would be arbitary and operationally difficult.

FEDERAL CIVILIAN EMPLOYEES AND THEIR DEPENDENTS LIVING OVERSEAS

Since the Census Bureau can obtain counts of persons in this category from administrative records provided by the Office of Personnel Management, we plan to publish counts of this population subgroup in 1990. We will not include these counts in the official totals for the states since the assignment to geography would be arbitrary and operationally difficult.

OTHER AMERICANS LIVING OVERSEAS

In the 1960 and the 1970 censuses the Census Bureau made attempts to obtain counts of Americans overseas who were not affiliated with the Federal Government. These attempts were not successful. For example, in 1970 we counted 680,000 civilians overseas, but data from foreign censuses show there were at least 1.2 million U.S. citizens overseas in 1970.[6] The decision on whether or not the Census Bureau should count this population subgroup is dependent on operational issues regarding accuracy and efficiency. Assuming that the Census Bureau could develop an operational definition, we would still face many

* The Department of Defense is presently negotiating with the Census Bureau for a direct enumeration of military personnel and their dependents living overseas. The plan would provide for counts based on an actual enumeration, rather than administrative records. The Census Bureau would not include the counts in the apportionment or other official totals for any state.

problems trying to obtain an accurate count. We do not know any administrative records that the Census Bureau could use to obtain a count of this population subgroup, thus, we would have to use direct enumeration. Voluntary outreach and publicity efforts by U.S. embassies and legations together with religious organizations, businesses, and colleges during the 1970 census were only marginally successful.[6] It is unlikely that the Census Bureau can direct effective and efficient outreach efforts toward this group in 1990. Given the many operational problems associated with obtaining an accurate count, the Census Bureau does not plan to count Americans living overseas who are not employees of the U.S. government.

The Census Bureau does plan to investigate the feasibility of obtaining administrative record counts of Americans overseas who are employees of the United States or multi-national corporations.

3. *RESIDENT NONCITIZENS*

The Census Bureau's traditional understanding of the Constitution and statutory law concerning the census is that it must attempt to count all residents, regardless of legal status. Throughout the past 20 censuses we have followed this traditional understanding of the Constitution. The following discussion details the Census Bureau's plans for counting persons in 1990 who are citizens of foreign countries.

RESIDENT ALIENS

This category includes citizens of foreign countries who are living in the United States on visas such as work or student visas. It also includes undocumented aliens who entered the country illegally and those who

entered the country legally but violated the terms of their visas. The Census Bureau has always attempted to count all persons whose usual residence on Census Day is in the United States, without regard to their legal status or citizenship, except for foreign travelers and residents of diplomatic missions.

For purposes of apportionment of the House of Representatives, the Census Bureau understands that the Constitution requires it to attempt to count all persons in each state without regard to their citizenship or legal status. The Federation for American Immigration Reform (FAIR) and several Members of Conress challenged this procedure before the 1980 census. In their suit against the Census Bureau, the plaintiffs charged that the count should not include illegal aliens for apportionment purposes. The government attorneys' legal argument centered on the wording in the Constitution, which specifies *persons* as the basis for apportionment, without distinguishing among the inhabitants other than Indians not taxed and slaves. Although the Court decided the lawsuit on procedural grounds (lack of standing), it did observe that illegal aliens "are clearly persons."[7]

Based on the traditional understanding of the Constitution, the Census Bureau will attempt to count all persons, including documented and undocumented aliens, residing in the United States on April 1, 1990. We will not count undocumented aliens who have not established a residence in the United States.

FOREIGN DIPLOMATS

Foreign diplomats include citizens of foreign countries attached to an embassy, consulate, legation, or chancellery of a foreign country or employed by an

international agency or mission such as the United Nations, the World Bank, or the International Monetary Fund. Beginning with the 1940 census, the Census Bureau has not counted such persons residing within the compound of an embassy or legation, since the diplomatic missions where they reside are actually foreign territory. The Census Bureau has counted in recent censuses employees of foreign embassies who *do not* live at the embassy.[8]

For the 1990 census, the Census Bureau does not plan to count citizens of a foreign country living on the premises of an embassy or legation because such persons are not residents of the United States. We will count foreign diplomatic personnel not living on the premises of an embassy or legation. The rationale for counting such persons is that they are residents of the United States.

C. *RESIDENCE RULES*

The Census Bureau will use the usual residence concept as the primary rule in determining where to include residents in the count. While the goal of the 1990 census is to count residents at their usual residence as of April 1, 1990, there are situations in which we must make special provisions to ensure that we meet this part of the goal. For the 1990 census, the Census Bureau must develop residence rules for persons whose usual residence is not the place where they are on Census Day or whose usual residence is ambiguous. The Census Bureau's plans for addressing these groups in 1990 follow.

1. *PERSONS AWAY FROM THEIR USUAL RESIDENCE ON CENSUS DAY*

The Census Act of 1790 provided for the counting at the usual residence of persons temporarily absent

from it at the time of the census. This practice has continued for all subsequent censuses and we will repeat it in the 1990 census.

Persons who report that their usual residence is different from the place where the Census Bureau contacts them include those traveling, living temporarily in hotels and motels, or maintaining a usual home elsewhere. The Census Bureau contacts such persons where they are physically staying on Census Day but asks them to provide the address of their usual residence. We then locate the questionnaire for the reported usual residence and add the person to that questionnaire if no one has reported him or her as a member of that residence already.

There are persons, though, who will not report the address of their usual residence or who will report an address that the Census Bureau can not identify on the census address file. We refer to such an address as an unidentifiable usual residence.[9]

The Census Bureau has examined several options for counting persons with unidentifiable usual residences. We have considered carefully how well each option contributes to the goal of obtaining accurate counts for all geographic areas. Some options examined would involve counting such persons at the place where we contact them, a procedure that might lead to an overcount to the extent that a household respondent or neighbor reports the persons at the usual residence. The other option would involve not counting them at the place where we contact them, the assumption being that a household respondent or neighbor would report such persons at the usual residence. If a household respondent or neighbor does not report these persons as household members at the

usual residence, adoption of this option could lead to an undercount.

In weighing these options against the goal of the census, the Census Bureau has determined that the option most in line with the enumeration and residence concepts is to assume that a household respondent or neighbor will report these persons at the usual residence. Accordingly, we have designed the 1990 enumeration and closeout procedures to count such persons at their usual residence. The Census Bureau believes that the extent of any undercount in a particular geographic area as a result of using this procedure would be substantially less than any concentrated overcount resulting from the adoption of the alternative procedure.

2. *PERSONS WITH MULTIPLE RESIDENCES*

Examples of persons with multiple residences include those who live for substantial periods at a residence other than their primary residence, children who spend time at each parental home, working couples in which the husband and wife maintain residences in separate cities, and Members of Congress who maintain residences in their home states as well as in the Washington D.C. area. The recent uptrend in some of these and other similar situations challenges the usual residence concept to the extent that the usual residence of persons with multiple residences is ambiguous or unclear.

There are two options available to the Census Bureau for counting persons with multiple residences. The Census Bureau can allow such persons to choose one residence as the primary residence or we can assign usual residence on the basis of objective criteria.

As in past censuses, for 1990 the Census Bureau plans to provide respondent instructions on the census questionnaire that will allow persons with multiple residences to identify one residence as their usual residence. We will count these persons at that residence. Similarly, the Census Bureau plans to count Members of Congress either at their Washington, D.C. area address or at their home state address, dependent upon which one they consider to be their usual residence.

3. *PERSONS WITH NO PERMANENT RESIDENCE*

Persons without a permanent residence include those living temporarily in housing units with friends or relatives, those living in transient quarters (motels, missions, shelters, and so forth) who do not claim a usual home elsewhere, and the homeless ("street people"). Since 1790, the Census Bureau has counted such persons as residents of the area where contacted. For 1990, the Census Bureau again plans to count all persons without a permanent residence in the area where we contact them.[9]

To obtain an accurate count of persons without a usual residence, the Census Bureau plans to conduct a special enumeration of persons living in shelters for the homeless and of "street people." This special enumeration will include a pre-Census Day identification of shelters, public parks, city blocks, and so forth, where the homeless congregate. The Census Bureau plans to ask local officials and local organizations that work with the homeless for assistance in identifying these places. Finally, we will use teams of interviewers to visit these places during a special "S-Night" to count persons found living or staying there.

4. *PERSONS AWAY AT COLLEGE*

Since the 1950 census, the Census Bureau has counted college students where they are living while attending college; before 1950, we counted students at the parental home. The Census Bureau changed the policy in 1950 because we had evidence that we were not counting some college students at all. In addition, applying the usual residence rule to college students required that we count them at the college. Following the 1970 census, the Borough of Bethel Park Pennsylvania challenged the Census Bureau's policy of counting college students at the college. The U.S. District Court that heard the suit ruled that the Census Bureau's policy for counting college students was "reasonable" since such students eat, sleep, and work for most of the year in the area of the college.[10]

In deciding where to count college students in 1990, the Census Bureau has considered the available options in light of the goal of the census. College students, particularly those living in dormitories, have a chance of being reported and counted at the parental residence. If we do not identify these cases, this could result in an overcount. On the other hand, to count college students at their parental home would be an unnecessary departure from the usual residence rule. In addition, some college students living in college dormitories no longer live with their parents at any time, and, hence, we can only count them at their college residence. Not counting such students at college could lead to an undercount. Finally, the practice of the Census Bureau in recent censuses of counting college students at their college residences has been upheld by a U.S. District Court.

Adherence to the usual residence concept requires that the Census Bureau continue to count college students at their residence at school in 1990.

5. *PERSONS AWAY AT BOARDING SCHOOL*

The Census Bureau traditionally counts boarding school students below the college level at their parental home. This procedure has continued in recent censuses because of the age of the students and their dependency on their parents.

In deciding where to count boarding school students in 1990, the Census Bureau has considered the possible ramifications of counting such students at the boarding school. Given the age and dependency status of boarding school students compared to college students, the Census Bureau believes the chance of double counting the former is more likely if counted at school than the chance of double counting college students. In addition, there is no known statutory law or legal precedent that stipulates where to count boarding school students. Given the traditional practice of counting such students at the parental home as well as the small numbers involved, the Census Bureau plans to count boarding school students at their parental home in 1990. This procedure represents a variation of the usual residence rule. In this case, however, the Census Bureau believes that due to the nature of the population subgroup, this procedure follows legal requirements.

6. *CREWS OF MERCHANT VESSELS*

In previous censuses, the Census Bureau counted crew members aboard U.S. ocean-going, coastal, and Great Lakes vessels at the port where the ship was

berthed on Census Day. If the ship was not berthed in a U.S. port but was in U.S. territorial waters, we counted the crew at the port of destination, provided that port was inside the United States or its territories. If in territorial waters and headed overseas, we counted the crew at the vessel's homeport. If not in territorial waters, we did not count them. We did not make a special attempt to count persons aboard various other types of ships such as those on inland waterways, fishing vessels, or oil rigs. For 1980, the Census Bureau understood that the crews of these ships tend to be gone from home only a short period of time. Thus, we assumed that a household respondent or neighbor reported them at the usual residence.

Operational factors as well as adherence to the usual residence concept guide the Census Bureau's decision on counting this population subgroup in 1990. Crews of merchant vessels are very transient; while many have no home other than the ship on which they work, others do maintain a home on shore that they consider to be their usual residence. Therefore, the usual residence rule requires that we count them at that usual residence, whether on board ship or on shore.

For crew members whose residence is on board ship, the Census Bureau has options on where to pinpoint the ship geographically on Census Day. The use of homeport is one option, but homeports tend to be chosen for tax purposes; the crew generally does not live there and the ship may never dock there. Enumerating the crew at the port where the ship is docked on Census Day is an option that appears preferable. Similarly, for ships that are not berthed in a U.S. port on Census Day and are in territorial waters, the Census Bureau will count the crew at the port of destina-

tion, provided that the port is within the United States or the U.S. territories. If the port of destination is not in the United States or its territories, we will count the crew at the ship's port of departure. We will not count the crews of merchant ships that are not within territorial waters or that are not American flag vessels.

The Census Bureau plans to treat crews of canneries, freezer ships, and tuna ships the same as ocean-going vessels in the 1990 census. The crews of these vessels are at sea for several months during the fishing season. The Census Bureau will count crew members who report a usual residence on shore at that residence.

The Census Bureau also plans to follow the practice of past censuses and not count crews of vessels on inland waterways, fishing vessels which deploy for short period, and oil rigs. The Census Bureau assumes that such persons maintain a residence on shore and that a household respondent or neighbor will report them at that usual residence.

7. *LAND-BASED MILITARY PERSONNEL*

The Census Bureau traditionally counts land-based members of the Armed Forces, including the U.S. Coast Guard, at the area where they are permanently stationed, provided it is within the United States or the U.S. territories. The use of usual residence to account for members of the Armed Forces is consistent with the criterion used to account for the civilian population.

The Census Bureau also will count military personnel assigned to a temporary duty station at the area of their *permanent duty station*.

8. *CREWS OF MILITARY SHIPS*

Before the 1970 census, the criterion used to determine where to count crews of military ships not deployed, including the U.S. Coast Guard, was the actual location of the ship on Census Day. In the 1970 and 1980 censuses, the Census Bureau counted the crews of such ships at the ship's homeport, regardless of the ship's location on Census Day, unless deployed to the 6th (Atlantic) or 7th (Pacific) Fleet. There were exceptions to this policy, however, in the 1980 census. If the ship's homeport contained total military shipboard strength of 1,000 or more, the Census Bureau allowed a crew member to claim a usual home elsewhere if the usual residence was within 50 miles of the port. If we could locate the address for the crew member, we counted the person at the usual residence; otherwise, the ship was the usual residence.[11] For the 1990 census, the Census Bureau plans to use the usual residence rule to determine where to count crews of military ships not deployed to the 6th or 7th Fleet. If the person's usual residence is the ship, the Census Bureau will count the person at the homeport location. In situations where the homeport includes more than one jurisdiction, the Census Bureau will count the crew at the jurisdiction where the ship is actually docked. The Census Bureau will allow crew numbers to report a usual residence ashore, regardless of the afloat strength of the homeport. We will attempt to match all such reports to the questionnaire for the home address and to match the person to the appropriate household. Thus, we will count crew members at their usual residence, whether it is on board ship or on shore.

9. *MOVERS*

Although resident citizens who move on or near Census Day are part of the resident population, obtaining accurate counts of this population subgroup has been operationally difficult in recent censuses.

The basic issue about counting movers concerns the application of the usual residence concept. Theoretically, the Census Bureau could count persons who move on or near Census Day at their old residence, at their new residence, or at a temporary residence. Thus, the operational problem is one of ensuring that we contact movers at one of the three possible locations but count them at only one. In 1990, the Census Bureau plans to develop enumerator and respondent instructions designed to ensure that we count movers at their usual residence as of Census Day. Thus, the Census Bureau will ask for the Census Day address of persons who moved on or near Census Day and who report that we have not already counted them at that address. We will count such persons at that Census Day address.

10. *MIGRANT WORKERS*

Before the 1980 census, we counted residents of migrant worker camps at the locality that contained the camp, the justification was that the camps have shifting populations composed mainly of persons with no fixed residence. Research after 1970 showed that many migrant workers did in fact have a place they considered as their usual residence. Thus, in the 1980 census, the Census Bureau gave residents of migrant worker camps the option of designating a usual residence other than at the camp where we contacted them. Based on their response, we counted

them either at the reported usual residence or at the camp where we contacted them.[11]

For the 1990 census, the Census Bureau plans to continue the practice of allowing residents of migrant worker camps to designate a usual residence other than the camp. We will count them at the usual residence if they report one. If they do not report a usual residence we will count them at the migrant worker camp.

11. *INSTITUTIONALIZED RESIDENTS*

The institutionalized population consists of all residents living under formally authorized, supervised care or custody. The facilities that house this population include correctional schools, penitentiaries, wards for juveniles, specialized hospitals, nursing homes for the elderly, and homes for the physically and mentally handicapped.[11]

For the 1990 census, the Census Bureau plans to differentiate between long-term and short-term facilities. We will count persons residing in long-term facilities (for example, penitentiaries, and mental hospitals) as residents of the institution. The Census Bureau will count persons residing in short-term facilities (for example, county jails and general hospitals) at their usual place of residence if they have one. This practice is consistent with the practices of recent censuses in applying the usual residence concept to persons residing in such facilities.

V. *CONCLUSION*

Enumeration and residence concepts for the 1990 census provide the basic framework for meeting the goal of the census. We will achieve that goal by appropriate strate-

gies, methods, and procedures. Developing the universe of interest within the legal parameters by carefully defining who and where to count is a critical component of the Census Bureau's concept of enumeration for the 1990 census.

In addressing whom to count, the concept of enumeration for 1990 is based on the Constitution and applicable statutory law which the Census Bureau has traditionally understood to require that all residents, regardless of citizenship or legal status, are part of the universe of interest which we must attempt to count. The first Census Act of 1790, based on an understanding of the constitutional mandate, established the concept of counting residents, not just citizens, and is consistent with the conceptual basis for the past 20 censuses.

The first census also established the concept of usual residence, and that is the conceptual basis for determining where to count persons in the 1990 census. The adoption of a usual residence concept is consistent with the goal of obtaining accurate counts at all geographic levels as well.

The enumeration and residence concepts for 1990 will ensure that the 21st Decennial Census of Population and Housing is the most complete and accurate of any in our country's history.

NOTES

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[5] Levine, D. B., Memorandum to Courtenay M. Slater, June 18, 1979, Subject: The Enumeration of Americans Overseas in the 1980 Census. U.S. Bureau of the Census. Washington, D.C.

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[8] Courtland, S., Memorandum to Peter Bounpane, July 13, 1984, Subject: Legal Issues Relating to the 1990 Census: Memorandum No. 1. U.S. Bureau of the Census, Washington, D.C.

[9] Miskura, S. M., Memorandum to William P. Butz, March 19, 1986, Subject: 1990 Enumeration and Residence Rules. U.S. Bureau of the Census, Washington, D.C.

[10] 1990 Research Paper on Enumeration and Residence Rules. Unpublished paper. U.S. Bureau of the Census, Washington, D.C., May 1985.

[11] *1990 Census Committee on Special Enumeration Practices, Final Report.* Washington, D.C.: U.S. Bureau of the Census, May 1985.

NOTE: **This Report is not reproduced with the Stipulation of Facts because it appears at pages 181-211 of the Administrative Record**

Attachment 2

DECENNIAL CENSUS RESIDENCE RULES AND ENUMERATION PRINCIPLES

A Report

Prepared for the Bureau of the Census by

CEC Associates
1522 K Street N.W., Suite 522
Washington, D.C. 20005
(202) 682-1350

February 1987

APPENDIX E.
Facsimiles of Respondent Instructions and Questionnaire Pages

229

EXHIBIT B

Your Guide for the

1990 U.S. Census Form

This guide gives helpful information on filling out your census form. If you need more help, call the local U.S. census office. **The telephone number is on the cover of the questionnaire.** After you have filled out your form, please return it in the envelope we have provided.

On the inside	Page
How to fill out your census form	2
Example	2
Your answers are confidential	2
Instructions for the census questions	3–5
What the census is about	5
Why the census asks certain questions	5

CENSUS '90

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXHIBIT B

How to Fill Out Your Census I

Please use a black lead pencil only. Black lead pencil is better to use than ballpoint or other pens. Most questions ask you to fill in the circle, or to print the information. See Examples below.

Make sure you print answers for everyone in this household. If someone in the household, such as a roomer or boarder, does not want to give you all the information for the form, print at least the person's name and answer questions 2 and 3. A census taker will call to get the other information directly from the person.

There may be a question you cannot answer exactly. For example, you might not know the age of an elderly person or the price for which your house would sell. Ask someone else in your household; if no one knows, give your best estimate.

Instructions for individual questions begin on page 3 of this guide. They will help you to understand the questions and answer them correctly.

If you have a question about filling out the census form or need assistance, call the local U.S. census office. The telephone number is given on the cover of the questionnaire.

If you do not mail back your census form, a census taker will be sent out to assist you. But it saves time and your taxpayer dollars if you fill out the form yourself and mail it back.

Example

a. Age	b. Year of birth	a. Age	b. Year of birth
41	1949	09	1981

Your Answers Are Confidential

The law authorizing the census (Title 13, U.S. Code) also provides that your answers are confidential. No one except census workers may see your completed form and they can be fined and/or imprisoned for any disclosure of your answers. Only after 72 years can your individual census form become available to other government agencies (whether federal, state, county, or local). Until then, no other person or business can see your individual report.

The same law that protects the confidentiality of your answers requires that you provide the information asked in this census to the best of your knowledge.

Information collected from the decennial census is used for a variety of statistical purposes. Census information is used to find out where funding is most needed for schools, health centers, highways, and other services. Census results are used by members of public and private groups—including community organizations—and by businesses and industries, as well as by agencies at all levels of government.

Instructions for / Questions 1a through 7

1a. List everyone who lives at this address in question 1a. If you are not sure if you should list a person, see the rules on page 1 of the census form. If you are still not sure, answer as best you can and fill in "Yes" for question H1a or H1b, as appropriate.

If there are more than seven people in your household, please list all the persons in question 1a, complete the form for seven people, and mail it back in the enclosed envelope. A census taker will call to obtain the information for the additional persons.

b. If everyone listed in question 1a usually lives at another address(es), print the address(es) in 1b.

2. Fill one circle to show how each person is related to the person in column 1.

If Other relative of the person in column 1, print the exact relationship such as son-in-law, daughter-in-law, grandparent, nephew, niece, mother-in-law, father-in-law, cousin, and so on.

If the Stepson/stepdaughter of the person in column 1 also has been legally adopted by the person in column 1, mark Stepson/stepdaughter but do not mark Natural-born or adopted son/daughter. In other words, Stepson/stepdaughter takes precedence over Adopted son/daughter.

4. Fill ONE circle for the race each person considers himself/herself to be.

If you fill the Indian (Amer.) circle, print the name of the tribe or tribes in which the person is enrolled. If the person is not enrolled in a tribe, print the name of the principal tribe(s).

If you fill the Other API circle (under Asian or Pacific Islander (API)), only print the name of the group to which the person belongs. For example, the Other API category includes persons who identify as Burmese, Fijian, Hmong, Indonesian, Laotian, Bangladeshi, Pakistani, Tongan, Thai, Cambodian, Sri Lankan, and so on.

If you fill the Other race circle, be sure to print the name of the race.

If the person considers himself/herself to be White, Black or Negro, Eskimo or Aleut, fill one circle only. Please do not print the race in the boxes.

The Black or Negro category also includes persons who identify as African-American, Afro-American, Haitian, Jamaican, West Indian, Nigerian, and so on.

All persons, regardless of citizenship status, should answer this question.

5. Print age at last birthday in the space provided (print "00" for babies less than 1 year old). Fill in the matching circle below each box. Also, print year of birth in the space provided. Then fill in the matching circle below each box. For an illustration of how to complete question 5, see the Example on page 2 of this guide.

6. If the person's only marriage was annulled, mark Never married.

7. A person is of Spanish/Hispanic origin if the person's origin (ancestry) is Mexican, Mexican-Am., Chicano, Puerto Rican, Cuban, Argentinean, Colombian, Costa Rican, Dominican, Ecuadorian, Guatemalan, Honduran, Nicaraguan, Peruvian, Salvadoran, from other Spanish-speaking countries of the Caribbean or Central or South America, or from Spain.

If you fill the Yes, other Spanish/Hispanic circle, print one group.

A person who is not of Spanish/Hispanic origin should answer this question by filling the No (not Spanish/Hispanic) circle. Note that the term "Mexican-Am." relates only to persons of Mexican origin or ancestry.

All persons, regardless of citizenship status, should answer this question.

Instructions for Questions H1a through H6

H1a. Refer to the list of persons you entered in question 1a on page 1. If you left anyone out of your list because you were not sure if the person(s) should be listed, answer question H1a as Yes. Then enter the name(s) and reason(s) why you did not list the person(s) on the lines provided. Otherwise, answer question H1a as No.

b. If you included anyone on your list even though you were not sure that you should list the person(s), answer question H1b as Yes. Then enter the name(s) and reason(s) why you listed the person(s) on the lines provided. Otherwise, answer question H1b as No.

H2. Fill only one circle.

Count all occupied and vacant apartments in the house or building. Do not count stores or office space.

Detached means there is open space on all sides, or the house is joined only to a shed or garage. *Attached* means that the house is joined to another house or building by at least one wall that goes from ground to roof. An example of A one-family house attached to one or more houses is a house in a row of houses attached to one another.

A mobile home or trailer that has had one or more rooms added or built onto it should be counted as a *one-family detached house*; a porch or shed is not considered a room.

H3. Count only whole rooms in your house, apartment, or mobile home used for living purposes, such as living rooms, dining rooms, kitchens, bedrooms, finished recreation rooms, family rooms, etc. Do not count bathrooms, kitchenettes, strip or pullman kitchens, utility rooms, foyers, halls, half-rooms, porches, balconies, unfinished attics, unfinished basements, or other unfinished space used for storage.

H4. Housing is owned if the owner or co-owner lives in it. Mark Owned by you or someone in this household with a mortgage or loan if the house, apartment, or mobile home is mortgaged or there is a contract to purchase. Mark Owned by you or someone in this household free and clear (without a mortgage) if there is no mortgage or other debt. If the house, apartment, or mobile home is owned but the land is rented, mark this question to show the status of the house, apartment, or mobile home.

Mark Rented for cash rent if any money rent is paid, even if the rent is paid by persons who are not members of your household, or by a federal, state, or local government agency.

Mark Occupied without payment of cash rent if the unit is not owned or being bought by the occupants and if money rent is not paid or contracted. The unit may be owned by friends or relatives who live elsewhere and who allow occupancy without charge. A house or apartment may be provided as part of wages or salary. Examples are: caretaker's or janitor's house or apartment; parsonages; tenant farmer or sharecropper houses for which the occupants do not pay cash rent; or military housing.

H5a. Answer H5a and H5b if you live in a one-family house or mobile home; include only land which you own or rent.

b. A business is easily recognized from the outside; for example, a grocery store or barber shop. A medical office is a doctor's or dentist's office regularly visited by patients.

H6. If this is a house, include the value of the house, the land it is on, and any other structures on the same property. If the house is owned but the land is rented, estimate the combined value of the house and the land. If this is a condominium unit, estimate the value for your house or apartment including your share of the common elements. If this is a mobile home, include the value of the mobile home and the value of the land. If you rent the land, estimate the value of the rented land and add it to the value of the mobile home.

Instructions Questions H7a and H7b

H7a. Report the rent agreed to or contracted for, even if the rent for your house, apartment, or mobile home is unpaid or paid by someone else.

If rent is paid:	Multiply rent by:	If rent is paid:	Divide rent by:
By the day	30	4 times a year	3
By the week	4	2 times a year	6
Every other week	2	Once a year	12

b. Answer Yes if meals are included in the monthly rent payment, or you must contract for meals or a meal plan in order to live in this building.

What the Census Is About – Some Questions and Answers

Why are we taking a census?

The most important reason for taking a decennial census is to determine how many representatives each state will have in Congress.

What does the Census Bureau do with the information you provide?

The individual information collected in the census is grouped together into statistical totals. Information such as the number of persons in a given area, their ages, educational background, the characteristics of their housing, etc., enable government, business, and industry to plan more effectively.

How long have we been taking the census?

The first census was taken in 1790 in accordance with the requirement in the 1st article of the constitution. A census has been taken every 10 years since. The 1990 Decennial Census marks the 200th anniversary of the census.

How are you being counted?

Census forms are delivered to all households a few days before census day. Households are requested to fill out the form and mail it back to the census office.

Why the Census Asks Certain Questions

Here are a few reasons for asking some of the questions.

It is as important to get information about people and their houses as it is to count them.

Name? Names help make sure that everyone in a household is counted, but that no one is counted twice.

Value or rent? Government and planning agencies use answers to these questions in combination with other information to develop housing programs to meet the needs of people at different economic levels.

CE.SUS '90

OFFICIAL 1990 U.S. CENSUS FORM

Thank you for taking time to complete and return this census questionnaire. It's important to you, your community, and the Nation.

The law requires answers but guarantees privacy.

By law (Title 13, U.S. Code), you're required to answer the census questions to the best of your knowledge. However, the same law guarantees that your census form remains confidential. For 72 years–or until the year 2062–only Census Bureau employees can see your form. No one else–no other government body, no police department, no court system or welfare agency–is permitted to see this confidential information under any circumstances.

How to get started–and get help.

Start by listing on the next page the names of all the people who live in your home. Please answer all questions with a black lead pencil. You'll find detailed instructions for answering the census in the enclosed guide. If you need additional help, call the toll-free telephone number to the left, near your address.

Please answer and return your form promptly.

Complete your form and return it by April 1, 1990 in the postage-paid envelope provided. Avoid the inconvenience of having a census taker visit your home.

Again, thank you for answering the 1990 Census. Remember: Return the completed form by April 1, 1990.

Para personas de habla hispana –
(For Spanish-speaking persons)

Si usted desea un cuestionario del censo en español, llame sin cargo alguno al siguiente número: 1-800-CUENTAN
(o sea 1-800-283-6826)

U.S. Department of Commerce
BUREAU OF THE CENSUS

FORM D-1

OMB No. 0607-0638
Approval Expires 07/31/91

The 1990 census must count every person at his or her "usual residence." This means the place where the person lives and sleeps most of the time.

1a. List on the numbered lines below the name of each person living here on Sunday, April 1, including all persons staying here who have no other home. If EVERYONE at this address is staying here temporarily and usually lives somewhere else, follow the instructions given in question 1b below.

Include

- Everyone who usually lives here such as family members, housemates and roommates, foster children, roomers, boarders, and live-in employees
- Persons who are temporarily away on a business trip, on vacation, or in a general hospital
- College students who stay here while attending college
- Persons in the Armed Forces who live here
- Newborn babies still in the hospital
- Children in boarding schools below the college level
- Persons who stay here most of the week while working even if they have a home somewhere else
- Persons with no other home who are staying here on April 1

Do NOT include

- Persons who usually live somewhere else
- Persons who are away in an institution such as a prison, mental hospital, or a nursing home
- College students who live somewhere else while attending college
- Persons in the Armed Forces who live somewhere else
- Persons who stay somewhere else most of the week while working

Print last name, first name, and middle initial for each person. Begin on line 1 with the household member (or one of the household members) in whose name this house or apartment is owned, being bought, or rented. If there is no such person, start on line 1 with any adult household member.

	LAST	FIRST	INITIAL		LAST	FIRST	INITIAL
1				7			
2				8			
3				9			
4				10			
5				11			
6				12			

1b. If EVERYONE is staying here only temporarily and usually lives somewhere else, list the name of each person on the numbered lines above, fill this circle ⟶ ○ and print their usual address below. DO NOT PRINT THE ADDRESS LISTED ON THE FRONT COVER.

House number — Street or road/Rural route and box number — Apartment number

City — State — ZIP Code

County or foreign country — Names of nearest intersecting streets or roads

NOW PLEASE OPEN THE FLAP TO PAGE 2 AND ANSWER ALL QUESTIONS FOR THE FIRST 7 PEOPLE LISTED. USE A BLACK LEAD PENCIL ONLY.

Please fill one column → for each person listed in Question 1a on page 1.	PERSON 1 Last name First name Middle name	PERSON 2 Last name First name Middle name
2. How is this person related to PERSON 1? Fill ONE circle for each person. If Other relative of person in column 1, fill circle and print exact relationship, such as mother-in-law, grandparent, son-in-law, niece, cousin, and so on.	START in this column with the household member (or one of the members) in whose name the home is owned, being bought, or rented. If there is no such person, start in this column with any adult household member.	If a RELATIVE of Person 1: ○ Husband/wife ○ Brother/sister ○ Natural-born or adopted son/daughter ○ Father/mother ○ Grandchild ○ Other relative ○ Stepson/stepdaughter If NOT RELATED to Person 1: ○ Roomer, boarder, or foster child ○ Unmarried partner ○ Housemate, roommate ○ Other nonrelative
3. Sex Fill ONE circle for each person.	○ Male ○ Female	○ Male ○ Female
4. Race Fill ONE circle for the race that the person considers himself/herself to be. If Indian (Amer.), print the name of the enrolled or principal tribe. If Other Asian or Pacific Islander (API), print one group, for example: Hmong, Fijian, Laotian, Thai, Tongan, Pakistani, Cambodian, and so on. If Other race, print race.	○ White ○ Black or Negro ○ Indian (Amer.) (Print the name of the enrolled or principal tribe.) ○ Eskimo ○ Aleut Asian or Pacific Islander (API) ○ Chinese ○ Japanese ○ Filipino ○ Asian Indian ○ Hawaiian ○ Samoan ○ Korean ○ Guamanian ○ Vietnamese ○ Other API ○ Other race (Print race)	○ White ○ Black or Negro ○ Indian (Amer.) (Print the name of the enrolled or principal tribe.) ○ Eskimo ○ Aleut Asian or Pacific Islander (API) ○ Chinese ○ Japanese ○ Filipino ○ Asian Indian ○ Hawaiian ○ Samoan ○ Korean ○ Guamanian ○ Vietnamese ○ Other API ○ Other race (Print race)
5. Age and year of birth a. Print each person's age at last birthday. Fill in the matching circle below each box. b. Print each person's year of birth and fill the matching circle below each box.	a. Age 0 0 0 0 0 0 1 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0 b. Year of birth 1 1 0 8 0 0 0 0 0 9 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0	a. Age 0 0 0 0 0 0 1 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0 b. Year of birth 1 1 0 8 0 0 0 0 0 9 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0
6. Marital status Fill ONE circle for each person.	○ Now married ○ Separated ○ Widowed ○ Never married ○ Divorced	○ Now married ○ Separated ○ Widowed ○ Never married ○ Divorced
7. Is this person of Spanish/Hispanic origin? Fill ONE circle for each person. If Yes, other Spanish/Hispanic, print one group.	○ No (not Spanish/Hispanic) ○ Yes, Mexican, Mexican-Am., Chicano ○ Yes, Puerto Rican ○ Yes, Cuban ○ Yes, other Spanish/Hispanic (Print one group, for example: Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.)	○ No (not Spanish/Hispanic) ○ Yes, Mexican, Mexican-Am., Chicano ○ Yes, Puerto Rican ○ Yes, Cuban ○ Yes, other Spanish/Hispanic (Print one group, for example: Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.)
FOR CENSUS USE →	○ ○	○ ○

EXHIBIT C

[SEAL] U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20620

[APR 14, 1988]

Honorable James C. Miller III
Director
Office of Management and Budget
Washington, D.C. 20603

Dear Mr. Miller:

This responds to your request for the views of the Department of Justice on H.R. 3639, a bill to prevent distortions in the reapportionment of the House of Representatives caused by the use of census population figures which include aliens, and H.R. 3814, "Relating to decennial censuses of population." In principal part, H.R. 3639 would eliminate illegal aliens from the United States census tabulation when apportioning representatives in Congress among the states. Like H.R. 3639, H.R. 3814 would exclude illegal aliens from the census count. It would include for apportionment purposes, however, members of the armed forces, civilian employees of the Department of Defense, and dependents of such members or employees, living overseas. For the reasons discussed below, we oppose passage of these bills because they raise serious constitutional problems.

Section two of the Fourteenth Amendment to the Constitution provides that:

> Representatives shall be apportioned among the several States according to their respective numbers,

> counting the whole number of persons in each State, excluding Indians not taxed.

U.S. Const., amend. XIV, sec. 2.[1] This constitutional provision is implemented by 13 U.S.C. 141(b).[2] Section 2 of H.R. 3639 would add a new paragraph (g) to 13 U.S.C. 141 to require the Secretary of Commerce to

> make such adjustments in total population figures as may be necessary, using such methods and procedures as the Secretary determines appropriate, in order that aliens in the United States in violation of the immigration laws shall not be counted in tabulating population for purposes of subsection (b) of this section.

The legislative history accompanying section 2 of the Fourteenth Amendment makes clear that Congress intended for all persons, including aliens residing in this country, to be included in the "whole number of persons in each State." *Id.*

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[1] Section 2 replaces, in part, the provision in Article I, sec. 2, cl. 3 of the Constitution that provided:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.

Although we have not found any cases interpreting the breadth of Article I, the Founding Fathers were aware that the census, and therefore apportionment, would be based on the number of State inhabitants, not of voters. See, e.g., *The Federalist Papers* (C. Rossiter, ed.), No. 54, at 338.

[2] Section 141(b) provides:

> The tabulation of total population by States under [the census] as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

The end of the Civil War and the freeing of the slaves meant an end to apportionment based on the "three fifths" provision of Article 1. See note 1. The Reconstruction Congress realized that once readmitted, the former Confederate states would increase their population base by forty percent, adding twelve Representatives to their prewar total of eighteen.[3] In an effort to undermine this growth in political power before these states were readmitted to the Union, the Thirty-ninth Congress examined various formulas designed to reduce representation whenever states, as expected, discriminated against portions of their male population by excluding them from voting on the basis of race.

For example, there was significant support in the Thirty-Ninth Congress for a proposal that representation be based on the number of male voters over the age of twenty-one. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 404 (1866). However, this proposal met serious resistance from many of the Northern states, especially in New England. These states had disproportionately large populations of non-voters, such as women (large numbers of men had left their homes to pioneer in the west) and aliens.[4] As Rep. Conk-

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[3] G. Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment,* 30 Ford. L. Rev. 93, 94 (1961) (Zuckerman).

[4] Zuckerman, *supra* note 3, at 95. As Sen. Wilson noted:

> How [does this proposal affect] the loyal States? It throws out of the basis at least two and a half millions of unnaturalized foreign-born men and women, and by this we lose at least fifteen Representatives . . . . in 1860 there were in the loyal States 3,856,628 unnaturalized persons of foreign birth, and in the rebel States 233,651. I estimate that Massachusetts would lose one Representative certainly, and probably two, by this change; that New York would lose at least four, Pennsylvania two, Ohio two; and other States would lose in their representation.

Cong. Globe, 39th Cong., 1st Sess. 1256 (1866).

ling, one of the original drafters of the Fourteenth Amendment, noted when defending his amendment to count persons rather than citizens, "[m]any of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these States are to pass upon the amendment. It must be acceptable to them." Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

Faced with extensive debate over the amendment's language, the Republicans became concerned that the measure would not pass the Senate.[5] They therefore went into caucus, agreeing to be bound by its decision, and adopted the present language regarding "persons" rather than "citizens." Notwithstanding the protests of opponents who bitterly denounced this language as nothing more than a political compromise designed to ensure passage of the amendment,[6] the Republicans held the majority and the amendment, apportioning representation on the "whole number of persons" in each state, was passed.

Thus, the Congress that passed the Fourteenth Amendment in 1866 not only recognized that aliens would be counted in the census but insisted upon their inclusion as part of a compromise designed to ensure that the amendment would be passed by the industrial states. They did so notwithstanding their acknowledgment that aliens were not *bona fide* members of the body politic. They rejected arguments that representation should be based on people with permanent ties to the country. They consciously chose to include aliens to advance their dual concerns: ensuring passage of the amendment by the northern states and, denial to the south of any additional representation in Congress.[7]

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[5] Zuckerman, *supra* note 3, at 105.

[6] Cong. Globe, 39th Cong., 1st Sess. 404, 405 (1866) (statement of Rep. Lawrence). See also *id.* at 2939 (statement of Sen. Hendricks).

[7] See generally Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 846-48 (1981).

It is noteworthy that the Supreme Court, in analyzing section 1 of the Fourteenth Amendment, has read the word "person" to include illegal aliens. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citations omitted), reh'g denied 458 U.S. 1131 (1982). It would seem reasonable to assume that those whom the drafters of the Fourteenth Amendment intended to include in the word "persons" in section 1 of the amendment are the same "persons" included by section 2.

We must note that the Reconstruction Congress did not discuss the issue of illegal aliens when it debated the Fourteenth Amendment.[8] It was, however, possible to be an illegal alien in 1866. The United States has had a statute since 1798 governing arrest and exclusion of aliens from hostile countries. Act of July 6, 1798, ch. 66, 1 Stat. § 77 (Act), codified at 50 U.S.C. 21. The President is authorized to arrest, secure and remove, with the aid of the courts and the federal marshals, any such aliens he identifies. Moreover, this statutory authority had been exercised prior to 1866.[9] Thus, although the issue was not raised in the debate over the Fourteenth Amendment, certain classes of aliens could be excluded from the United States in 1866 and removed by order of the President if they attempted to return.[10]

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[8] C. Gordon and H. Rosenfeld, 1 *Immigration Law & Procedure*, at 1-8 (1985).

[9] *Lockington v. Smith*, 15 Fed. Cas. 758 (C.C. Pa. 1817) (No. 8448); *Lockington's Case*, Brightly N.P. 269 (Pa. 1813).

[10] Moreover, subsequent Congresses have acknowledged, by their efforts to exclude aliens from the census, that the Fourteenth Amend-

The Department of Justice has advised previous Congresses considering identical legislation that aliens must be included within the census for purposes of apportioning congressional Representatives,[11] and has adopted that position in court.[12] We have reexamined this position and continue to believe that it is sound. Accordingly, we find that to the extent that H.R. 3639 and H.R. 3814 would exclude illegal aliens from the census, they are unconstitutional.

We turn now to the question of whether it is constitutional to include in any tabulation of population for purposes of the apportionment any members of the armed forces, civilian employees of the Department of Defense (DOD), or dependents of such members or employees,

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ment requires the counting of all aliens. The 71st and 72nd Congresses debated passage of constitutional amendments that would have excluded aliens in the count for apportionment of representatives. See H.R. Rep. 2761, 71st Cong., 3d Sess. (1931); H.R. Rep. 823, 72d Cong., 1st Sess. (1932). The Senate legal counsel had earlier issued an opinion concluding that aliens could not be excluded. 71 Cong. Rec. 1821 (1929). In 1940, a bill to exclude aliens was defeated. See *e.g.*, 86 Cong. Rec. 4372 (1940) (statement of Rep. Cellar) ("If you want aliens out, you must amend the Constitution").

[11] *See* e.g., Testimony of David A. Strauss, Attorney-Adviser, Office of Legal Counsel, 1980 Census: Counting Illegal Aliens, Hearing on S. 2366 Before the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs, 96th Cong., 2d Sess., at 96 (1980) (Hearing).

[12] See Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss the Action or, in the Alternative, for Summary Judgement and in Opposition to Plaintiff's Application for a Preliminary Injunction, filed in *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (3-judge court) (*FAIR*), appeal dismissed, 447 U.S. 916 (1980). The Memorandum is reprinted in the Hearings, supra note 11, at 125. The *FAIR* court endorsed the government's position in *dictum*. See 486 F. Supp. at 576-77 (reading section 2 to include all aliens) (dictum).

when any such individuals are assigned to a post outside the United States. While we continue to review the case law and legislative history pertinent to resolution of this question, we note that throughout the debates on section 2 of the Fourteenth Amendment, there seems to be a premise that the census would count inhabitants of the United States, and not individuals who did not reside in one of the states.[13] Accordingly, we entertain serious doubts as to the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, DOD civilian employees, or their dependents, when such individuals live outside the United States. We therefore must oppose passage of this provision in H.R. 3814 at this time.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

/s/ JACK E. PERKINS
for Thomas M. Boyd
Acting Assistant Attorney General

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[13] The Department of Commerce advises that the Census Bureau has never counted for apportionment purposes U.S. Ambassadors, military personnel or State Department personnel stationed abroad. The Bureau's practice is based upon the concept of usual residence, which historically has been defined as where a person lives and sleeps most of the time.

EXHIBIT D

POSSIBLE 1990 APPORTIONMENTS FOR MASSACHUSETTS UNDER VARIOUS METHODS

	Exact Q	Adam	Harm	EQPR	Webs	Jeff	Ham
Apportionment Population	10.532	10	10	10	11	11	11
Resident Population	10.549	10	10	11	11	11	11

EXACT Q = EXACT QUOTA (The integer and fraction of seats due a state given its population)
ADAM = ADAMS (SMALLEST DIVISORS) METHOD – Never used
HARM = DEAN (HARMONIC MEAN) METHOD – Never used
EQPR = EQUAL PROPORTIONS (HILL) METHOD – Used 1940-1990
WEBS = WEBSTER (MAJOR FRACTIONS) METHOD – Used 1840, 1880-1910, 1930
JEFF = JEFFERSON (GREATEST DIVISORS) METHOD – Used 1790-1830
HAM = HAMILTON/VINTON METHOD – Used 1850-1870

EXHIBIT E

MASSACHUSETTS' CONGRESSIONAL ALLOCATION 1940-1990

	Quota	Hill	Webster
1940	14.333	14	14
1950	13.612	14	14
1960	12.543	12	13
1970	12.208	12	12
1980	11.049	11	11
1990	10.532	10	11

ORDER NOTING PROBABLE JURISDICTION

ORDER LIST

FRIDAY, MARCH 20, 1992

PROBABLE JURISDICTION NOTED

91-1502 FRANKLIN, SEC. OF COMMERCE V. MASSACHUSETTS, ET AL.

The motion to expedite consideration of the statement as to jurisdiction is granted. In this case probable jurisdiction is noted. The motion to permit filings initially in typewritten form is granted. The joint appendix is to be filed by Wednesday, March 25, 1992. If the State of Washington should wish to file any further papers on the application for stay, it must do so by Wednesday, March 25, 1992. Briefs on the merits are to be filed by the parties with the Clerk of this Court and served upon the parties on or before 3 p.m. Monday, April 13, 1992. Replies thereto, if any, are to be filed with the Clerk and served upon the parties on or before 3 p.m. Monday, April 20, 1992. The case is set for oral argument on Tuesday, April 21, 1992.

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